



SHDKT

PROCEEDINGS AND ORDERS

DATE: [01/15/97]

CASE NBR: [95101906] CFY
 SHORT TITLE: [United States
 VERSUS [Watts, Vernon

STATUS: [DECIDED]

] DATE DOCKETED: [052896]

PAGE: [01]

-----DATE----NOTE-----

PROCEEDINGS & ORDERS-----

- 1 Apr 12 1996 G Application (A95-840) to extend the time to file a petition for a writ of certiorari from April 23, 1996 to May 23, 1996, submitted to Justice O'Connor.
 2 Apr 12 1996 Application (A95-840) granted by Justice O'Connor extending the time to file until May 23, 1996.
 3 May 23 1996 G Petition for writ of certiorari filed. (Response due June 27, 1996)
 6 Jun 27 1996 G Motion of Morris L. Whitman for leave to file a brief as amicus curiae filed.
 4 Jul 10 1996 DISTRIBUTED. September 30, 1996 (Page 38)
 5 Sep 4 1996 F Response requested -- AS.
 7 Sep 25 1996 Brief of respondent Vernon Watts in opposition filed.
 8 Sep 30 1996 Brief of respondent Cheryl Putra in opposition filed.
 9 Sep 30 1996 G Motion of respondent Cheryl Putra for leave to proceed in forma pauperis filed.

*** Related Case - Use VIDE,LS with SE ***

SHDKT

PROCEEDINGS AND ORDERS

DATE: [01/15/97]

CASE NBR: [95101906] CFY
 SHORT TITLE: [United States
 VERSUS [Watts, Vernon

STATUS: [DECIDED]

] DATE DOCKETED: [052896]

PAGE: [02]

-----DATE----NOTE-----

PROCEEDINGS & ORDERS-----

- 10 Oct 9 1996 REDISTRIBUTED. November 1, 1996 (Page 1)
 11 Oct 15 1996 X Reply brief of petitioner United States filed.
 13 Nov 4 1996 REDISTRIBUTED. November 8, 1996 (Page 12)
 15 Nov 12 1996 REDISTRIBUTED. November 15, 1996 (Page 16)
 17 Nov 22 1996 REDISTRIBUTED. November 27, 1996 (Page 29)
 20 Nov 29 1996 LODGING consisting of Ninth Circuit filing in United States v. Sherpa received from the Solicitor General and distributed.
 19 Dec 2 1996 REDISTRIBUTED. December 6, 1996 (Page 15)
 22 Dec 9 1996 REDISTRIBUTED. December 13, 1996 (Page 14)
 24 Dec 30 1996 REDISTRIBUTED. January 3, 1997 (Page 28)
 25 Jan 6 1997 Petition GRANTED. Judgment REVERSED and case REMANDED Concurring opinion by Justice Scalia. Concurring opinion by Justice Breyer. Dissenting opinion by Justice Stevens. Dissenting opinion by Justice Kennedy. Opinion

*** Related Case - Use VIDE,LS with SE ***

Last page of docket

SHDKT

PROCEEDINGS AND ORDERS

DATE: [01/15/97]

CASE NBR: [95101906] CFY
 SHORT TITLE: [United States
 VERSUS [Watts, Vernon

STATUS: [DECIDED]

] DATE DOCKETED: [052896]

PAGE: [03]

-----DATE----NOTE-----

PROCEEDINGS & ORDERS-----

- 25 Jan 6 1997 Petition GRANTED. Judgment REVERSED and case REMANDED Concurring opinion by Justice Scalia. Concurring opinion by Justice Breyer. Dissenting opinion by Justice Stevens. Dissenting opinion by Justice Kennedy. Opinion

2pp

per curiam.

Motion of Morris L. Whitman for leave to file a brief as
amicus curiae GRANTED.

Motion of respondent Cheryl Putra for leave to proceed
in forma pauperis GRANTED.

*** Related Case - Use VIDE,LS with SE ***

OFFICE OF THE CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

VERNON WATTS

UNITED STATES OF AMERICA, PETITIONER

v.

CHERYL PUTRA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREBEN
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

LISA SIMOTAS
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a court sentencing a defendant for the offense of conviction may consider conduct underlying a charge of which the defendant was acquitted.

(I)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute and sentencing guidelines provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	17
Appendix A	1a
Appendix B	18a
Appendix C	34a
Appendix D	41a
Appendix E	52a

TABLE OF AUTHORITIES

Cases:

<i>Brazton v. United States</i> , 500 U.S. 344 (1991).....	9
<i>BMW of North America, Inc. v. Gore</i> , No. 94-896 (May 20, 1996)	11
<i>Dowling v. United States</i> , 493 U.S. 342 (1990)....	14
<i>Frias v. United States</i> , 115 S. Ct. 1433 (1995).....	9
<i>Kamen v. Kemper Financial Serv., Inc.</i> , 500 U.S. 90 (1991)	16
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986).....	14
<i>Nichols v. United States</i> , 114 S. Ct. 1921 (1994) ..13, 14, 15	
<i>One Lot Emerald Cut Stones v. United States</i> , 409 U.S. 232 (1972)	14
<i>Roberts v. United States</i> , 445 U.S. 552 (1980).....	17
<i>United States v. Averi</i> , 922 F.2d 765 (11th Cir. 1991)	9
<i>United States v. Bernard</i> , 757 F.2d 1439 (4th Cir. 1985)	11
<i>United States v. Billups</i> , 43 F.3d 281 (7th Cir. 1994), cert. denied, 115 S. Ct. 1389 (1995)	9
<i>United States v. Boney</i> , 977 F.2d 624 (D.C. Cir. 1992)	8, 14

Cases—Continued:

	Page
<i>United States v. Bowdach</i> , 561 F.2d 1160 (5th Cir. 1977)	12
<i>United States v. Brady</i> , 928 F.2d 844 (9th Cir. 1991)	4, 6, 9, 14
<i>United States v. Cardi</i> , 519 F.2d 309 (7th Cir. 1975)	12
<i>United States v. Coleman</i> , 947 F.2d 1424 (10th Cir. 1991), cert. denied, 503 U.S. 972 (1992)	9
<i>United States v. Dawn</i> , 897 F.2d 1444 (8th Cir.), cert. denied, 498 U.S. 960 (1990)	9
<i>United States v. Donelson</i> , 695 F.2d 583 (D.C. Cir. 1982)	11
<i>United States v. Duncan</i> , 918 F.2d 647 (6th Cir. 1990), cert. denied, 500 U.S. 933 (1991)	8, 9
<i>United States v. Dunnigan</i> , 507 U.S. 87 (1993)	15
<i>United States v. Fonner</i> , 920 F.2d 1330 (7th Cir. 1990)	9
<i>United States v. Funt</i> , 896 F.2d 1288 (11th Cir. 1990)	11
<i>United States v. Grayson</i> , 438 U.S. 41 (1978)	11, 15
<i>United States v. Isom</i> , 886 F.2d 736 (4th Cir. 1989)	8
<i>United States v. Juarez-Ortega</i> , 866 F.2d 747 (5th Cir. 1989)	8, 9
<i>United States v. Meyers</i> , 990 F.2d 1083 (8th Cir. 1993)	9
<i>United States v. Moccia</i> , 891 F.2d 13 (1st Cir. 1989)	8
<i>United States v. Montenegro-Rojo</i> , 908 F.2d 425 (9th Cir. 1990)	6
<i>United States v. Morgan</i> , 595 F.2d 1134 (9th Cir. 1979)	11
<i>United States v. One Assortment of 89 Firearms</i> , 465 U.S. 354 (1984)	14
<i>United States v. Restrepo</i> , 946 F.2d 654 (9th Cir. 1991), cert. denied, 503 U.S. 961 (1992)	14
<i>United States v. Rodriguez-Gonzalez</i> , 899 F.2d 177 (2d Cir.), cert. denied, 498 U.S. 844 (1990)	8, 9
<i>United States v. Romulus</i> , 949 F.2d 713 (4th Cir. 1991), cert. denied, 503 U.S. 992 (1992)	9

Cases—Continued:

	Page
<i>United States v. Ryan</i> , 866 F.2d 604 (3d Cir. 1989)	8
<i>United States v. Smith</i> , 991 F.2d 1468 (9th Cir. 1993)	6
<i>United States v. Sweig</i> , 454 F.2d 181 (2d Cir. 1972)	12
<i>United States v. Tucker</i> , 404 U.S. 443 (1972)	11
<i>United States v. Walsh</i> , No. 92-10118 (9th Cir. 1993)	9
<i>United States v. Wright</i> , 873 F.2d 437 (1st Cir. 1989)	12
<i>Wasman v. United States</i> , 468 U.S. 559 (1984)	11
<i>Williams v. New York</i> , 337 U.S. 241 (1949)	10, 11, 16
<i>Witte v. United States</i> , 115 S. Ct. 2199 (1995)	4, 5, 7, 13, 15, 16

Statutes and Regulations:

Sentencing Reform Act of 1984, 18 U.S.C. 3551 et seq.	12
18 U.S.C. 3577 (1970)	11, 12
18 U.S.C. 924(c)	2, 3, 4, 9
18 U.S.C. 3661	12
21 U.S.C. 841(a)(1)	2, 3, 5

Sentencing Guidelines:

§ 1B1.3	13
§ 1B1.3(a)(1)	12
§ 1B1.3(a)(2)	13
§ 1B1.4	12
§ 2D1.1(b)(1)	3, 4, 9
§ 6A1.3	14
App. C, Amend. 387	14

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, PETITIONER

v.

VERNON WATTS

UNITED STATES OF AMERICA, PETITIONER

v.

CHERYL PUTRA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Watts* (App., *infra*, 1a-17a) is reported at 67 F.3d 790. The order

(1)

denying a petition for rehearing (App., *infra*, 39a-40a) is reported at 79 F.3d 768. The order denying respondent's petition for a writ of certiorari is reported at 116 S. Ct. 1369. The opinion of the court of appeals vacating the sentence in *Putra* (App., *infra*, 18a-38a) is reported at 78 F.3d 1386. The opinion affirming Putra's conviction (App., *infra* 41a-51a) is unpublished.

JURISDICTION

The judgment of the court of appeals in *Watts* was entered on September 28, 1995, and the order denying rehearing was entered on January 24, 1996. App., *infra*, 39a. By order dated April 12, 1996, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 23, 1996. The judgment of the court of appeals in *Putra* was entered on March 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Section 3661 of Title 18 of the United States Code, and the pertinent provisions of Sections 1B1.3, 1B1.4, and 2D.1 of the Sentencing Guidelines are reproduced at App., *infra*, 52a-79a.

STATEMENT

1. *Watts*. After a jury trial in the United States District Court for the Eastern District of California, respondent Watts was convicted of possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and was acquitted of using or carrying a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c). He was sentenced

to 262 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed his conviction, but it vacated his sentence. App., *infra*, 1a-17a.

a. Watts was placed under police surveillance after his probation officer became suspicious that he was selling cocaine and was living with his girlfriend, Sonja Lee, rather than with his mother, as he claimed. On the day of his arrest, police officers followed as Watts drove from his probation interview to the home of Sonja Lee, where he parked and went inside. Later that day, Watts drove to another house, where he remained for about a minute. Upon leaving, he drove in a suspicious manner, using what the officers believed were counter-surveillance techniques. App., *infra*, 2a-4a.

Believing that Watts had just participated in a drug deal, the officers stopped his car. A search of the car uncovered a set of keys and a garage door opener, which were later determined to open the front door and the garage door of Lee's residence. The officers conducted a probation search of Lee's home, during which they discovered a substantial quantity of cocaine base ("crack") in a kitchen cabinet and two loaded firearms and ammunition in a bedroom closet. Lee admitted that she and Watts lived in the house together, and Watts confessed that the guns and drugs were his. App., *infra*, 4a.

b. A jury convicted Watts of possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), but acquitted him of using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). As sentencing, the district court, relying on Sentencing Guidelines § 2D1.1(b)(1), enhanced Watts' base offense level by two levels on the basis of his posses-

sion of a firearm. The court sentenced Watts to 262 months' imprisonment (the bottom of the applicable sentencing range), to be followed by a five-year term of supervised release. App., *infra*, 5a, 12a.

c. The Ninth Circuit affirmed respondent's conviction, but it vacated his sentence. Relying on *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), the court held that it was error to enhance respondent's sentence under Guidelines § 2D1.1(b)(1), because a court "sentencing a criminal defendant for the offense of conviction cannot reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count." App., *infra*, 12a. The court reiterated *Brady*'s conclusions that it "would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted," *id.* at 13a, and that a sentencing court therefore cannot consider facts underlying an acquittal "under any standard of proof." *Id.* at 15a (emphasis in original). The court acknowledged that six other circuits have held that a defendant's acquittal on a charge under 18 U.S.C. 924(c) does not preclude a sentencing enhancement for possession of a firearm under Guidelines § 2D1.1(b)(1). App., *infra*, 15a-16a n.3.

The panel subsequently denied a petition for rehearing, rejecting the government's argument that its decision was inconsistent with *Witte v. United States*, 115 S. Ct. 2199 (1995). The government argued that *Witte* made clear that a sentencing court's consideration of criminal conduct for which the defendant was not convicted, in sentencing him for the offense of conviction, does not amount to "punishment" for the uncharged conduct. The court of appeals explained that the government did not

timely bring *Witte* to the panel's attention. App., *infra*, 39a-40a.

2. *Putra*. After a jury trial in the United States District Court for the District of Hawaii, respondent Putra was convicted of aiding and abetting in the possession of one ounce of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). She was acquitted of conspiracy to distribute cocaine and of aiding and abetting in the possession of five ounces of cocaine with intent to distribute it. Putra was sentenced to 27 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed her conviction in an unpublished memorandum disposition (App., *infra*, 19a, 41a-51a), but it vacated her sentence in a published opinion. *Id.* at 18a-38a.

a. The evidence at trial established that Putra's co-defendant, Vassilios Liaskos, ran a major cocaine importation and distribution operation in Honolulu, Hawaii. See Gov't C.A. Br. 5-7 (summarizing government's case). Putra was herself a cocaine dealer who purchased drugs from Liaskos. *Id.* at 10, 11. In the spring of 1992, Liaskos groomed Putra to take over his cocaine business while Liaskos went to Greece for the summer. A government witness testified that Putra and Liaskos sold him one ounce of cocaine on May 8, 1992, and five ounces of cocaine on May 9, 1992. A surveillance team watched and photographed both transactions. App., *infra*, 42a-43a; Gov't C.A. Br. 13-14, 27-28.

The jury convicted Putra on the charge arising from the May 8, 1992, sale, but acquitted her of conspiracy and of the charge arising from the May 9, 1992, sale. At sentencing, the district court found by a preponderance of the evidence that Putra was involved in the May 9 transaction, and accordingly,

determined her base offense level under the Guidelines by aggregating the cocaine involved in both the May 8 and the May 9 sales. App., *infra*, 19a. The district court explained that it was not punishing Putra for the May 9 sale, but that the May 9 transaction constituted relevant conduct under Guidelines § 1B1.3, and was therefore properly considered in determining the appropriate penalty for the offense of conviction. See 1/3/94 Tr. 6-7.

b. Relying on *Brady*, *supra*, a divided panel of the Ninth Circuit vacated Putra's sentence.¹ The majority conceded that Section 1B1.3 of the Sentencing Guidelines "indicates [that] it is proper to include the total quantity of drugs involved in the same course of conduct * * * even if the defendant is convicted of only one count." App., *infra*, 22a. The majority noted, however, that *Brady* forbids a district judge from "reconsider[ing] facts during sentencing that have been rejected by a jury's not guilty verdict," *id.* at 23a, and that the rule of *Brady* is "a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." *Id.* at 24a.

¹ Putra was released from prison on January 12, 1996, after completing the 27-month term of imprisonment originally imposed by the district court. Putra's release does not render this case moot, because she is currently serving a three-year term of supervised release, and that portion of her sentence could be affected by further review. Under the Ninth Circuit's ruling, the district court on remand will be required to impose a shorter prison term under the Guidelines. In that event, respondent might, under Ninth Circuit law, "be entitled to an earlier end to [her] term of supervised release." *United States v. Smith*, 991 F.2d 1468, 1470 (9th Cir. 1993); see also *United States v. Montenegro-Rojo*, 908 F.2d 425, 431 n.8 (9th Cir. 1990) (same).

In this case, the majority concluded, "by acquitting [Putra] of [the May 9, 1992] charge, the jury necessarily found that she was not involved in the possession of that cocaine," App., *infra*, 21a, and "allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted." *Id.* at 23a. The majority thus found that *Brady* prohibited the sentencing court from "disregard[ing] the jury verdict on [that charge] and substitut[ing] its own factual finding." *Id.* at 24a.

Chief Judge Wallace dissented. He explained that the issue was not whether Putra could be sentenced for a crime of which she was found not guilty; rather, it was whether her sentence for the offense of conviction could be increased because of her involvement in the May 9 transaction. App., *infra*, 26a. Judge Wallace noted that under pre-Guidelines law it was clearly appropriate for a sentencing court to rely on conduct for which the defendant had been tried and acquitted in sentencing her for an offense for which she was convicted, and that the Guidelines channelled the sentencing court's discretion without eliminating that traditional authority. *Id.* at 30a-32a. Judge Wallace acknowledged that *Brady*, *supra*, and its progeny "changed [that] practice," *id.* at 32a, but he concluded that this Court's decision in *Witte* rejected *Brady*'s "core rationale" (*id.* at 33a) by making clear that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Id.* at 34a (emphasis deleted). In light of *Witte*, Judge Wallace argued, "*Brady* must not be considered as continuing circuit authority." *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred in holding that when a court imposes a sentence for the offense of conviction, it may not consider facts or conduct underlying a charge of which the defendant was acquitted. That rule conflicts with the decisions of 11 other circuits which hold that acquitted conduct may be considered in determining an appropriate sentence for the offense of conviction. The Ninth Circuit's rule also conflicts with decisions of this Court recognizing that courts may consider facts proved at sentencing by a lesser burden of proof than applies at trial, and that consideration of such facts in sentencing a defendant does not result in punishment for any offense other than the offense of conviction. Because the Ninth Circuit's rule substantially undermines the uniformity that the Sentencing Guidelines were intended to promote, these cases warrant review by this Court.

1. The Ninth Circuit's conclusion that a sentencing court may never consider conduct underlying charges of which the defendant was acquitted is at odds with the published decisions of every other regional court of appeals, all of which have concluded that a sentencing court may rely on such conduct if the government establishes it by a preponderance of the evidence.² Indeed, as the panel in *Watts* con-

² See *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992); *United States v. Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 498 U.S. 844 (1990); *United States v. Ryan*, 866 F.2d 604, 608-609 (3d Cir. 1989); *United States v. Isom*, 886 F.2d 736, 738-739 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 500 U.S. 933 (1991); *United States v.*

ceded (App., *infra*, 15a-16a n.3), every other circuit to consider the question has specifically held that a sentencing court may rely on Guidelines § 2D1.1(b)(1) to enhance the sentence of a defendant acquitted on a charge of violating 18 U.S.C. 924(c).³

The government unsuccessfully sought en banc reconsideration of the panel's decision in *Brady*, and again when the Ninth Circuit reaffirmed *Brady* in *United States v. Walsh*, 985 F.2d 577 (9th Cir. 1993) (Table). We had refrained from seeking this Court's intervention, however, because the Ninth Circuit stated in *Brady* that its rule was based on an interpretation of the Guidelines, *Brady*, 928 F.2d at 852 n.14, and it therefore appeared to raise an issue for the Sentencing Commission to address under *Braxton v. United States*, 500 U.S. 344, 348-349 (1991). See, e.g., 94-7632 U.S. Br. in Opp., *Frias v. United States*, cert. denied, 115 S. Ct. 1433 (1995). The Ninth Circuit, however, not only has adhered to *Brady* in subsequent cases (see App., *infra*, 33a (Wallace, J., dissenting)), but now has

Fonner, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); *United States v. Dawn*, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 498 U.S. 960 (1990); *United States v. Coleman*, 947 F.2d 1424, 1429 (10th Cir. 1991), cert. denied, 503 U.S. 972 (1992); *United States v. Averi*, 922 F.2d 765 (11th Cir. 1991).

³ See *United States v. Billups*, 43 F.3d 281, 288 (7th Cir. 1994), cert. denied, 115 S. Ct. 1389 (1995); *United States v. Meyers*, 990 F.2d 1083, 1086 (8th Cir. 1993); *United States v. Romulus*, 949 F.2d 713, 716-717 (4th Cir. 1991), cert. denied, 503 U.S. 992 (1992); *United States v. Coleman*, 947 F.2d at 1428-1429; *United States v. Duncan*, 918 F.2d at 652; *United States v. Rodriguez-Gonzales*, 899 F.2d at 180-182; *United States v. Mocciola*, 891 F.2d at 16-17; *United States v. Juarez-Ortega*, 866 F.2d at 749.

made plain “that *Brady* is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines.” App., *infra*, 24a. Because the Sentencing Commission cannot displace the Ninth Circuit’s rule, and because the Ninth Circuit has twice declined to reconsider that rule en banc, only this Court’s intervention can correct the Ninth Circuit’s error and restore uniformity to this important area of federal sentencing law.

2. The Ninth Circuit’s decisions disregard well-settled statutory and decisional authority establishing that sentencing courts have the discretion to consider a wide range of information at sentencing, including facts underlying charges for which the defendant has not been convicted.

a. In *Williams v. New York*, 337 U.S. 241 (1949), a defendant convicted of murder and sentenced to death challenged the trial court’s reliance on information that the defendant had been involved in 30 burglaries for which he had not been convicted. This Court rejected the defendant’s due process challenge to his sentence, explaining that “both before and since the American colonies became a nation, courts in this country * * * practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.” *Id.* at 246. The Court reasoned that “[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics,” and that possession of such information would enable the sentencing court to impose a “punishment [that]

fit the offender and not merely the crime.” *Williams*, 337 U.S. at 247; see *BMW of North America, Inc. v. Gore*, No. 94-896 (May 20, 1996), slip op. 12 n.19 (“A sentencing judge may even consider past criminal behavior which did not result in a conviction * * *,” citing *Williams*).

The principles reaffirmed by *Williams* were codified by Congress in former 18 U.S.C. 3577 (1970). See *United States v. Grayson*, 438 U.S. 41, 50 n.10 (1978) (noting that 18 U.S.C. 3577 was based on *Williams*).⁴ Those principles were consistently applied both by this Court and by lower courts before the enactment of the Guidelines. See, e.g., *Wasman v. United States*, 468 U.S. 559, 564 (1984) (“Allowing consideration of such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant”); *United States v. Tucker*, 404 U.S. 443, 446 (1972) (sentencing “judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come”). Under those principles, it was “well established that a sentencing judge [could] take into account facts introduced at trial relating to [] charges * * * of which the defendant ha[d] been acquitted.” *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.).⁵

⁴ Section 3577 provided:

[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

⁵ See also *United States v. Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990) (applying pre-Guidelines law); *United States v.*

Nothing in the Guidelines or the Sentencing Reform Act of 1984 (Act) narrowed the scope of the district court's discretion in that regard. The Act recodified the former 18 U.S.C. 3577 without change, see 18 U.S.C. 3661; see also Guidelines § 1B1.4. And, consistent with pre-Guidelines case law, the Sentencing Commission defined the relevant conduct that a sentencing court must consider in determining the guideline range to include the entire scope of activities that surrounded the specific events supporting the offense of conviction. See, e.g., Guidelines § 1B1.3(a)(1) (court shall determine sentence on basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" during commission of, preparation for, or attempted escape from offense of conviction). As then-Judge Breyer noted, "very roughly speaking, [relevant conduct under the Guidelines] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989), quoted with approval in *Witte*, 115 S. Ct. at 2207.

The Guidelines do not require that conduct form the basis for a conviction to be considered in sentencing for an offense. The commentary to Guidelines § 1B1.3 states that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Guidelines

Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States v. Morgan*, 595 F.2d 1134, 1136 (9th Cir. 1979); *United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States v. Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States v. Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

§ 1B1.3 (Background). With respect to certain offenses (such as Putra's narcotics conviction), Guidelines § 1B1.3(a)(2) requires the sentencing court to consider "all acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction," and the relevant commentary explains that "[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts." Guidelines § 1B1.3 (Application Note 3). The commentary to Guidelines § 1B1.3 also observes that certain guidelines "may expressly direct that a particular [sentencing] factor be applied only if the defendant was convicted of a particular statute," but provides that "[u]nless such an express direction is included, *conviction under the statute is not required.*" Guidelines § 1B1.3 (Application Note 6) (emphasis added); see also *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994) (Guidelines case; reaffirming propriety of a sentencing court's consideration of "a defendant's past criminal behavior, even if no conviction resulted from that behavior"); *Witte*, 115 S. Ct. at 2205 (same).

b. The Ninth Circuit's decisions do not acknowledge the settled pre-Guidelines practice outlined above. Nor has that court identified any source of authority for its "judicial limitation" (App., *infra*, 24a) on the Guidelines provisions that incorporate the same long-standing practice. Instead, the Ninth Circuit's rule is based on the twin premises that (i) an acquittal "necessarily" represents a jury finding that the defendant "was not involved" in the conduct underlying the charge, see, e.g., App., *infra*, 21a; and (ii) a court that considers acquitted conduct in sentencing for the offense of conviction "punishes" the

defendant for a crime of which he was acquitted. Each of those premises is flawed.

As to the first premise, this Court has repeatedly recognized that a defendant's "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984); see also *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (per curiam). For that reason, "an acquittal in a criminal case does not preclude the Government from re-litigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States*, 493 U.S. 342, 349 (1990). Under the Guidelines, facts relevant to sentencing need only be proved by a preponderance of the evidence. See Guidelines § 6A1.3 (Commentary); see also *Nichols v. United States*, 114 S. Ct. at 1928 (due process satisfied by application of preponderance standard); *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (same).^{*} Thus, as one judge has phrased it, "[t]he hard logic of the differing burdens-of-proof analysis" (*United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., concurring in part and dissenting in part)) supports the conclusion, adopted by 11 circuits, that a defendant's acquittal on a charge at the guilt phase of trial does

* Even before the Sentencing Commission amended the Guidelines to clarify the applicable standard of proof at sentencing (see Guidelines, App. C., amend. 387), the Ninth Circuit had concluded that the preponderance-of-the-evidence standard applied to factfinding under the Guidelines. See *United States v. Restrepo*, 946 F.2d 654, 656 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. 961 (1992). None of the Ninth Circuit cases applying the *Brady* rule cites *Restrepo*.

not bar the government from proving facts underlying that charge by the preponderance-of-the-evidence standard that applies at sentencing.

As to the Ninth Circuit's second premise, i.e., that the defendant is being punished for the acquitted conduct, this Court has long recognized that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Witte*, 115 S. Ct. at 2207. Rather, the court has explained, "the offender is * * * punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment." *Id.* at 2207-2208; see also *Nichols*, 114 S. Ct. at 1927 ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction"; they "penal[ize] only the last offense committed by the defendant"). Thus, for example, both before and after the enactment of the Guidelines, the Court has held that a court may constitutionally consider the defendant's perjury at trial in sentencing him for the offense of conviction, see *United States v. Dunnigan*, 507 U.S. 87 (1993); *United States v. Grayson*, *supra*, and has rejected the contention that such a practice amounts to "punishment for the crime of perjury for which he has not been indicted, tried, or convicted by due process," *Grayson*, 438 U.S. at 52. Indeed, as this Court recently recognized in *Witte v. United States*, *supra*, "by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial," this Court's

cases since *Williams v. New York, supra*, "necessarily imply that such consideration does not result in 'punishment' for such conduct." *Witte*, 115 S. Ct. at 2206.⁷

3. The Ninth Circuit's error calls for correction by this Court. The *Brady* rule is an unwarranted limitation on the facts a district court may consider at sentencing. Consideration of conduct relating to charges of which a defendant was acquitted does not violate any constitutional or statutory provision or any policy reflected in the Guidelines. Rather, by impeding sentencing courts within the Ninth Circuit from exercising their responsibility to impose punish-

⁷ The panel in *Watts* concluded that it was not required to follow this Court's decision in *Witte* because the government did not timely bring *Witte* to the panel's attention. *Witte*, however, was decided by this Court more than three months before the *Watts* panel issued its original opinion. The panel nonetheless decided *Watts*'s claim, and reaffirmed circuit precedent in a manner that binds future panels in other cases, on the basis of "a truncated body of law." *Kamen v. Kemper Financial Serv., Inc.*, 500 U.S. 90, 100 n.5 (1991) ("[I]f a court undertakes to sanction a litigant by deciding an effectively raised claim on the basis of a truncated body of law, the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided"). Moreover, as *Witte* itself made clear, 115 S. Ct. at 2206-2207, that case simply applied principles of law that were recognized by this Court long before the Ninth Circuit adopted the *Brady* rule, and which the Ninth Circuit has simply declined to follow in *Brady* and its progeny. Indeed, the government relied on *Witte* in opposing Putra's claim in the court of appeals, but the *Putra* panel did not address that reliance—notwithstanding Chief Judge Wallace's dissenting view that the "core rationale" of *Brady* cannot be reconciled with *Witte*, see App., *infra*, 33a.

ment that "fit[s] the offender and not merely the crime," *Roberts v. United States*, 445 U.S. 552, 556 (1980) (quoting *Williams*, 337 U.S. at 247), the *Brady* rule subverts the Guidelines' fundamental goal of promoting uniform sentencing in the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

LISA SIMOTAS
Attorney

MAY 1996

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 94-10272

D.C. No. CR-93-00086-WBS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VERNON WATTS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
August 14, 1995—San Francisco, California
Filed September 28, 1995

Before: Betty B. Fletcher, Cecil F. Poole,
and Diarmuid F. O'Scannlain, Circuit Judges

Opinion by Judge Fletcher

(1a)

OPINION

FLETCHER, Circuit Judge:

Vernon Watts appeals his conviction and sentence for possessing with the intent to distribute crack cocaine. We affirm the conviction but vacate Watts's sentence and remand for resentencing.

I. FACTUAL BACKGROUND

The events leading to Watts's arrest and conviction began with the suspicions of Watts's probation officer, John Demmel. Although California's probationers are subject to a condition authorizing warrantless searches of their property, Demmel was well aware that some probationers would lie to their probation officers about where they were living so they could continue to engage in criminal activity without being hindered by probation searches. Demmel had begun to suspect that Watts was one such probationer, telling Demmel that he lived with his mother on Florida Way while he continued his criminal activity undetected at another residence.

When Demmel mentioned his concern to Detective James Cooper of the Sacramento County Sheriff's Department, Cooper told Demmel that he had learned from a confidential informant that Watts was living on the south side of the county with a woman named Sonja Lee and her children, that he drove a Ford Taurus and a minivan, and that he was selling cocaine. His suspicions raised, Demmel asked Cooper to locate Watts's actual residence by following Watts after he left his next probation meeting.

About a week later, when Watts drove away from Demmel's office in a Ford Taurus, Cooper followed.

Although Cooper lost Watts before locating his residence, he did not return to Demmel empty handed: He informed Demmel that Watts was driving a Ford Taurus registered in Watts's name. Demmel found this suspicious because, according to Watts, he was unemployed and had no transportation. Demmel and Cooper discussed the possibility of organizing a larger surveillance team to follow Watts to his residence.

Conveniently, Demmel was one of four probation officers assigned to the Crack Rock Impact Project (CRIP), a federally funded, multi-agency task force devoted to enforcing the laws against crack cocaine. Demmel asked Detective Emanuel Rivera, another member of CRIP, to assist in the surveillance. After a briefing with other members of CRIP, Demmel instructed the participating police officers to conduct a probation search of Watts's residence if they were able to locate it and to stop and search Watts's vehicle if they observed evidence of drug trafficking.

When Watts left Demmel's office in his Ford Taurus after his next scheduled probation interview, Rivera and other CRIP officers followed, staying in contact with Demmel by telephone. The officers hit pay dirt. Watts drove to a house at 8374 Wheatland Way and went inside. Rivera called the electric company and determined that the house's utilities were registered to Sonja Lee. An automobile parked in the driveway also was registered to Lee.

When Watts left the house in his Taurus with a woman and child, Demmel asked the officers to continue their surveillance. Later in the day, Watts dropped the woman and child back at the Wheatland Way address and drove alone to the Florinda Way address where he supposedly lived with his mother.

The officers watched Watts walk to the front door, knock, wait a while, and then leave when no one responded.

Watts then went to a house on Bicentennial Circle for approximately one minute. After he left, Watts drove using what the officers believed to be counter-surveillance techniques, such as driving at variable speeds and making numerous, apparently unnecessary turns. Based on his observations, Rivera believed that Watts had participated in a drug deal at the Bicentennial Circle address. Pursuant to Demmel's request at the CRIP briefing session, Rivera stopped Watts to conduct a probation search of his vehicle. Demmel arrived shortly thereafter. In the search of Watts's car, police discovered a set of keys and a garage door opener. Police later determined that one of the keys and the garage door opener were to the front door and the garage of the Wheatland Way house, respectively.

Demmel directed the officers to conduct a probation search of the Wheatland Way house. When police entered the house with Watts's key, Lee was inside. She told police that she and Watts lived there together. Officers searched the house and found crack cocaine in the kitchen cabinet and two loaded firearms and ammunition in a bedroom closet. After the search, Watts confessed that the guns and drugs were his.

Watts was indicted for possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and for using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c). Watts moved to suppress the evidence obtained in the search of the house, arguing that the probation search was a subterfuge for a criminal investigation

and that Demmel and police lacked sufficient reason to believe that he lived at Wheatland Way. The district court denied Watts's motion after a hearing.

After a jury trial, Watts was convicted on the narcotics charge and acquitted on the weapons charge. The district court sentenced Watts to 262 months in prison and 60 months of supervised release. He appeals.

II. LAWFULNESS OF THE PROBATION SEARCH

Watts argues that the district court should have suppressed the fruits of the probation search because Demmel was acting as a "stalking horse" for police and because Demmel lacked a reasonable basis for believing that Watts lived at the Wheatland Way address. We disagree, and we affirm Watts's conviction.

A

Because a state's operation of its probation system presents "special needs" beyond normal law enforcement which render impracticable the Fourth Amendment's usual warrant and probable cause requirements, probation searches conducted pursuant to state law satisfy the Fourth Amendment's reasonableness requirement. *Griffin v. Wisconsin*, 483 U.S. 868, 872-80 (1987). However, a probation search may not be used as a subterfuge for a criminal investigation. See *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975). Watts argues that the district court should have suppressed the fruits of the probation search because Demmel was acting as a "stalking horse" for police when he authorized the search. We review

for clear error the district court's factual determination that Demmel was not acting as a stalking horse. *See United States v. Butcher*, 926 F.2d 811, 815 (9th Cir.), cert. denied, 500 U.S. 959 (1991); *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir.), cert. denied, 474 U.S. 830 (1985).

A probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers. *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir.), cert. denied, 488 U.S. 866 (1988); *Smith v. Rhay*, 419 F.2d 160, 162-63 (9th Cir. 1969). However, collaboration between a probation officer and police does not in itself render a probation search unlawful. *See United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991) (parole officer was not a stalking horse simply because police helped him locate parolee); *Jarrad*, 754 F.2d at 1454 (fact that police investigation preceded parole search does not render the search a subterfuge); *United States v. Gordon*, 540 F.2d 452, 453 (9th Cir. 1976) (finding a lawful probation search even though Narcotics Task Force agents accompanied the probation officer to expedite the search). The appropriate inquiry is whether the probation officer used the probation search to help police evade the Fourth Amendment's usual warrant and probable cause requirements or whether the probation officer enlisted the police to assist his own legitimate objectives. *Harper*, 928 F.2d at 897. A probation officer does not act as a stalking horse if he initiates the search in the performance of his duties as a probation officer. *Butcher*, 926 F.2d at 815; *Jarrad*, 754 F.2d at 1454.

The district court determined that Demmel, not the police, decided to conduct the probation search. Nor-

mally this finding would be sufficient to support the determination that Demmel was not a stalking horse. *See Harper*, 928 F.2d at 897; *Butcher*, 926 F.2d at 815; *Richardson*, 849 F.2d at 441; *Jarrad*, 754 F.2d at 1454. However, Demmel's dual role as both probation officer and member of the concededly "enforcement oriented" CRIP team renders the relevant inquiry more difficult. Watts argues that Demmel was acting more as a police officer than a probation officer.

We share the district court's concern that the participation of a probation officer on a project devoted to law enforcement carries the risk of abusing the probation officer's ability to conduct searches without a warrant and with less than probable cause, a power that is constitutionally permissible only because of the probation system's "'special needs' beyond normal law enforcement." *Griffin*, 483 U.S. at 873-74 (emphasis added). We are especially troubled by the district court's express finding that "at least one of the purposes of the CRIP Team is to allow for probation searches in cases where police officers want to search the residence, vehicle or property of a probationer and to avoid the necessity of getting a warrant for the search."

However, the district court's ultimate conclusion that Demmel "was calling the shots" and that he was motivated by the legitimate objectives of the probation system is not clearly erroneous. The district court found that Demmel, as Watts's probation officer and before the participation of any police officers, suspected that Watts did not actually live with his mother on Florinda Way and had returned to the business of selling drugs. His suspicions grew when Cooper—not a member of the CRIP team—told him

that, according to an informant, Watts was selling cocaine again and living with Lee somewhere other than on Florinda Way. Police officers on the CRIP team became involved only at the request of Demmel, who sought their assistance locating Watts's actual residence, a task which proved elusive when attempted by Cooper alone. This would be a different case if police officers had targeted a suspect as part of a normal law enforcement investigation and then enlisted the help of a probation officer in order to search the suspect's home without a warrant supported by probable cause. *See Smith*, 419 F.2d at 162-63 (not a valid parole search when police enlisted parole officer to assist in criminal investigation). Whatever potential for or actual abuse of probation searches which may exist in operating CRIP, the district court did not commit clear error in determining that, in this case, CRIP officers acted as support for a legitimate probation search.

B

We turn next to Watts's argument that the probation search, even if not a subterfuge, nevertheless was unlawful because Demmel lacked the requisite level of suspicion that Watts lived at the Wheatland Way house. The parties agree that a probation search must be supported by some reason to believe that the probationer resides at the premises to be searched. *See Harper*, 928 F.2d at 896; *United States v. Dally*, 606 F.2d 861, 863 (9th Cir. 1979). However, the parties dispute the level of suspicion necessary to support a probation search.

There is some tension among our cases regarding whether a probation search must be supported by probable cause to believe that the probationer resides

on the premises or whether a "reasonable" belief will suffice. In *Harper*, we characterized the requisite level of suspicion as probable cause. Our principal holding in that case was that, under the Supreme Court's decision in *Griffin*, police could search a parolee's home to execute an arrest warrant issued by a parole board. *Harper*, 928 F.2d at 896. We also held that police could conduct such a search only if they had "probable cause" to believe that the arrestee actually lived at the place to be searched. *Id.*

However, before *Harper* we held in *Dally* that a parole search was lawful because the parole officer had a "reasonable basis" and "reasonable belief" that the parolee had moved to the searched residence. *Dally*, 606 F.2d at 863. Moreover, despite our mention in *Harper* of a probable cause requirement, we cited with approval in that case the "reasonable belief" standard employed in *Dally*. *See Harper*, 928 F.2d at 896 (citing *Dally*, 606 F.2d 861). Our decision in *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991), is also relevant. In *Davis*, decided shortly after *Harper*, we held that an item such as a closed container falls within the scope of a probation search as long as there is "reasonable suspicion" to believe that the item is within the ownership, possession, or control of the probationer. *Davis*, 932 F.2d at 758-60. In doing so, we stated broadly that "[t]he permissible bounds of a probation search are governed by a reasonable suspicion standard." *Id.* at 758.

We need not resolve the apparent tension between *Harper*'s probable cause standard and the "reasonableness" standard enunciated in *Dally* and, more recently, *Davis*. We conclude that Demmel and police had probable cause to believe that Watts was living

at the Wheatland Way address. In weekly visits to the Florinda Way house, Demmel had located Watts there only once in fourteen months. On that one occasion, Demmel looked around the house and concluded that what was supposed to be Watts's bedroom lacked the usual signs of residency, such as clothing and personal belongings.

Demmel's suspicions grew when he learned that a confidential reliable informant, who had provided information to Cooper more than a dozen times and whose tips had resulted in multiple convictions, had informed Cooper that Watts was living with Sonja Lee somewhere other than on Florinda Way. Police surveillance verified both the details and the substance of the informant's tip. According to the informant, Watts drove a Ford Taurus; in the first surveillance of Watts, Cooper learned that, contrary to what Watts had told his probation officer, Watts was driving and was the registered owner of a Ford Taurus. In the subsequent surveillance, police observed Watts enter a house whose utilities were verified as registered to Sonja Lee and in whose driveway was a car registered to Sonja Lee. Finally, officers saw Watts go to his mother's home on Florinda Way, knock on the door, then leave when no one responded, strongly suggesting that Watts did not live there. These pieces of information, considered together, were sufficient to give Demmel and the police probable cause to believe that Watts lived at the Wheatland Way address.¹

¹ Watts argues that his ownership of a key and garage door opener corresponding to the Wheatland Way house cannot be considered in determining whether Demmel and police had adequate reason to believe that he lived there. He argues that the police determined that the key and the garage door

III. SENTENCING ISSUES

Watts appeals his sentence, arguing among other things that the district court erred in determining the quantity of drugs involved in the offense and by enhancing his sentence for possessing a weapon. We uphold the district court's factual finding regarding the quantity of drugs involved in the offense unless it is clearly erroneous. *United States v. Upshaw*, 918 F.2d 789, 791 (9th Cir. 1990), cert. denied, 499 U.S. 930 (1992). We review *de novo* the district court's interpretation of the Sentencing Guidelines. *United States v. Blaize*, 959 F.2d 850, 851 (9th Cir.), cert. denied, 504 U.S. 978 (1992).

A

Watts argues that the district court erred in determining that his offense involved more than 500 grams of crack. Rivera testified at trial that the crack seized from Watts's home weighed 559 grams when it was seized. A few weeks later, the drugs weighed 550 grams. However, by the time of trial, the drugs' weight had dropped below 500 grams.

The district court did not clearly err in determining that the offense of conviction involved more than 500 grams of crack. The drugs were weighed twice before trial, and each time they weighed significantly more than 500 grams. Although the weight of the drugs fell below 500 grams by the time of trial, expert testimony at trial established that the weight

opener corresponded to the house only by using them, which was itself an invasion of privacy that must be justified by probable cause. We need not reach this issue because, even without this information, Demmel and police had probable cause to believe that Watts lived at Wheatland Way.

loss could be due to water loss. The government's chemist testified that the moisture in the crack could evaporate and escape as a vapor through small pores in the plastic bags which stored the crack. In light of Watts's failure to submit evidence contradicting this testimony, the district court's acceptance of the government's theory was not clearly erroneous. *See United States v. Thomas*, 11 F.3d 620, 631 (6th Cir. 1993) (upholding district court's determination that offense involved more than fifty grams of crack because, although the weight of the crack dropped below fifty grams by the time of trial, expert testified that weight loss was attributable to evaporation and the use of small amounts of crack for testing), *cert. denied*, — U.S. —, 114 S. Ct. 1570 (1994).

B

The district court enhanced Watts's base offense level by two levels under U.S.S.G. § 2D1.1(b)(1), which applies if "a dangerous weapon (including a firearm) was possessed" during the offense of conviction. Watts argues that *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), precludes this adjustment because the jury acquitted him of violating section 924(c). We agree.

The general rule is that "conduct other than that of which a defendant was convicted may be considered in calculating the offense level . . . if it is part of the same course of conduct as the crime of conviction." *United States v. Piper*, 918 F.2d 839, 840 (9th Cir. 1990). However, a district court sentencing a criminal defendant for the offense of conviction cannot reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count. *Brady*, 928 F.2d at 851.

In *Brady*, the defendant had been convicted of voluntary manslaughter and assault with a dangerous weapon, but was acquitted of first degree murder and assault with intent to commit murder. Despite the jury's not guilty verdict, the district court at sentencing departed upward from the applicable guideline range because it determined that the defendant had the "intent to inflict serious injury or to kill the victims." We held that the jury's acquittal on the other, more serious counts was binding at sentencing because "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." *Id.* at 851.

We reaffirmed the *Brady* rule in *United States v. Pinkney*, 15 F.3d 825 (9th Cir. 1994). In *Pinkney*, the defendant was convicted of conspiring to commit a robbery, but was acquitted of armed robbery. We held that the jury's not guilty verdict on the armed robbery charge prevented the district court from applying a sentencing enhancement for brandishing a firearm during a robbery. *Id.* at 828-29.

The government argues that the district court could apply a sentencing enhancement under U.S.S.G. § 2D1.1(b)(1) without considering facts "necessarily rejected" by the jury's acquittal on the section 924(c) charge, because the sentencing enhancement contains fewer elements than the section 924(c) statutory offense. Section 924(c) provides a mandatory five-year sentence for any person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." 18 U.S.C. § 924(c). A firearm is used "in relation to" an offense if it facilitated or played a role in the crime. *United States v. Winslow*, 962 F.2d 845, 850 (9th

Cir. 1992). The mere presence of a firearm during a drug trafficking offense is not sufficient to support a violation of section 924(c). *United States v. Phelps*, 877 F.2d 28, 30 (9th Cir. 1989).

The government emphasizes that, in contrast to section 924(c), section 2D1.1(b)(1)'s sentencing enhancement is appropriate if the defendant possessed a weapon during the commission of the offense; the government need not prove that the firearm was used in relation to or facilitated the offense. *See United States v. Restrepo*, 884 F.2d 1294, 1296 (9th Cir. 1989) (possession of a weapon during the offense of conviction is sufficient to support application of an enhancement under U.S.S.G. § 2D1.1(b)(1)). Therefore, the government argues, the district court's determination that Watts possessed a firearm is not a reconsideration of facts rejected by the jury, because the jury could have acquitted Watts on the section 924(c) charge because it believed that Watts possessed a firearm during the offense but that the firearm was not connected to the offense.

Although the government's argument has some surface appeal, it does not withstand closer scrutiny. The connection of a firearm to the offense of conviction, although not an *element* of the weapon enhancement under the Guidelines, is nonetheless relevant. The commentary to U.S.S.G. § 2D1.1(b)(1) provides an exception to the enhancement if the defendant can show that "it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment (n.3); *see also Restrepo*, 884 F.2d at 1296.

Thus, the connection between the firearm and the predicate offense is relevant under both the sentencing enhancement and section 924(c); the only difference between U.S.S.G. § 2D1.1(b)(1) and section 924(c)

is the assignment and standard of the burden of proof regarding this connection.² We held in *Brady* that a sentencing judge may not, "under *any* standard of proof," rely on facts of which the defendant was acquitted. *Brady*, 928 F.2d at 851 & n.12 (emphasis added); *accord Pinkney*, 15 F.3d at 829 n.3. The district court's comments at sentencing make clear that it violated *Brady*.

I find that there is a connection between the possession of the guns and the offense.

...

In that regard, although the jury did not find beyond a reasonable doubt that all of the elements, including facilitation of the commission of the offense, were proven, I find by the preponderance of the evidence that the only logical explanation for the guns is that they emboldened Mr. Watts in his possession of the drugs and in his drug dealings.

By applying a two-level enhancement for possession of a weapon under U.S.S.G. § 2D1.1(b)(1), despite the jury's not guilty verdict on the section 924(c) charge, the district court disregarded *Brady*.³ We

² The language of section 924(c) (1) requires that a firearm be used "in relation to" a drug trafficking crime, and the exception to the firearm enhancement applies if it is clearly improbable that the firearm was "connected with the offense." However, this circuit has rejected any distinction between the phrases "in connection with" and "in relation to." *United States v. Routon*, 25 F.3d 815, 818 (9th Cir. 1994).

³ We recognize that several circuits have held that a defendant's acquittal of a section 924(c) charge does not preclude a sentencing enhancement for possession of a firearm under

vacate Watts's sentence and remand for resentencing.* See *United States v. Nash*, — F.3d — (9th Cir. 1995) (Aug. 24, 1995, Slip op. 10697); *United States v. Still*, 850 F.2d 607, 610 (9th Cir. 1988).

I. CONCLUSION

The search of the Wheatland Way address was a lawful probation search. Police had probable cause to believe that Watts resided at the house, and the district court's finding that the search was not a subter-

U.S.S.G. § 2D1.1(b)(1). See, e.g., *United States v. Billops*, 43 F.3d 281, 288 (7th Cir. 1994), cert. denied, — U.S. —, 115 S. Ct. 1389 (1995); *United States v. Romulus*, 949 F.2d 713, 716-17 (4th Cir. 1991), cert. denied, 503 U.S. 992 (1992); *United States v. Coleman*, 947 F.2d 1424, 1428-29 (10th Cir. 1991), cert. denied, 503 U.S. 972 (1992); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990); *United States v. Moccia*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989). However, these circuits are not bound by *Brady*. See *Brady*, 928 F.2d at 850-51 (noting that other circuits permit a sentencing court to make findings of fact that have been implicitly rejected by a jury's acquittal).

* Watts raises two additional sentencing issues not properly before us in this appeal. He argues that he was entitled to a three-level reduction for acceptance of responsibility, not just the two-level reduction awarded by the district court. He also argues that there is no scientific or medical basis for distinguishing between crack cocaine and cocaine and, therefore, under the rule of lenity the district court should have sentenced him under the less severe guidelines governing cocaine-related offenses. Because Watts did not raise these issues in the district court, and they are not purely matters of law or subject to any other exception, we do not address them here. See *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990); *United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir. 1987).

fuge for a criminal investigation was not clearly erroneous. We vacate the sentence and remand for resentencing, however, because the application of a two-level upward adjustment for possession of a firearm during the offense violated *Brady* in light of the jury's not guilty verdict on the section 924(c) charge.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 94-10040

D.C. No. CR-92-00784-HMF

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHERYL PUTRA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Hawaii

Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted
February 14, 1995—San Francisco, California

Filed March 5, 1996

Before: J. Clifford Wallace, Chief Judge,
Procter Hug, Jr., and Jerome Farris, Circuit Judges

Opinion by Judge Hug;
Dissent by Chief Judge Wallace

OPINION

HUG, Circuit Judge:

Cheryl Ann Putra was convicted of one count of aiding and abetting in the possession of one ounce of cocaine with intent to distribute. She appealed both her conviction and her sentence. In an unpublished memorandum disposition, we affirmed her conviction along with the convictions of her codefendants. *United States v. Putra*, No. 94-10040 (filed March 5, 1996). This opinion concerns her appeal of her sentence. Putra contends that the district court improperly considered as “relevant conduct” the cocaine involved in a separate count of which the jury acquitted her. We have jurisdiction under 8 U.S.C. § 1291, and we remand for resentencing.

I.

Count 18 of Putra’s indictment charged her with aiding and abetting in the possession with intent to distribute one ounce of cocaine on May 8, 1992. Count 19 charged her with aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992. In addition, she was charged in Count 2 with conspiring knowingly and intentionally to distribute a quantity of cocaine in excess of 500 grams. Following trial, the jury returned a guilty verdict on Count 18, but it acquitted her on Count 19 and Count 2. However, at sentencing, the district court determined that the preponderance of the evidence showed that Putra was involved in both of the charged aiding and abetting transactions. The court aggregated the amount of cocaine involved in Counts 18 and 19 to determine her offense level, despite the

jury acquittal on Count 19. Without the added cocaine from Count 19, Putra's guideline range would have been 15-21 months; with the added cocaine included, her range was 27-33 months. The court sentenced her to 27 months.

II.

The issue on appeal is whether a judge can sentence a defendant for a crime of which the jury found her not guilty. We review a district court's interpretation of the Sentencing Guidelines *de novo*. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994). We conclude that the court erred by failing to apply our prior decision in *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991).

The court instructed the jury generally on aiding and abetting that:

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts or conduct of such other persons just as though the defendant

had committed the acts or engaged in such conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some manner with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find a defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

The court went on to instruct the jury on the individual offenses. Regarding the counts against Putra, the instructions read in part: "The defendants are charged in Counts . . . 18 [and] 19 . . . with possession with intent to distribute cocaine." The court then set forth the elements of possession.

The jury acquitted Putra of aiding and abetting in the possession with intent to distribute the five ounces of cocaine involved in Count 19. By acquitting her of this charge, the jury necessarily found that she was not involved in the possession of that cocaine. Putra challenges the court's inclusion of the additional

cocaine as improper under the Sentencing Guidelines as interpreted by our decision in *Brady*.

United States Sentencing Guidelines ("U.S.S.G.") § 1B1.3(a)(2) provides that the defendant's base offense level shall be determined, with respect to offenses of a character for which U.S.S.G. § 3D1.2(d) would require grouping, on the basis of all acts and omissions described in subdivision (1)(A) and (1)(B) that were part of the same course of conduct or common scheme or plan as the offense of conviction. Subdivision (1)(A) includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3(a)(1)(A). Application note 3 further states that under subsection (a)(2), the proper course is to include the total quantity of narcotics involved regardless of the fact that the defendant has not been convicted of the multiple counts. As an example, the application note provides that where a defendant is engaged in multiple drug sales, as part of the same course of conduct or common scheme or plan, then the total quantity of drugs involved is to be used to determine the offense level, even if the defendant is convicted of a single count charging only one of the sales. U.S.S.G. § 1B1.3, comment. (n.3).

Although U.S.S.G. § 1B1.3, as interpreted by application note 3, indicates it is proper to include the total quantity of drugs involved in the same course of conduct scheme or plan even if the defendant is convicted of only one count, it does not deal with the situation where the defendant was charged with the other count involved and is acquitted. We considered this situation in an analogous context in *United*

States v. Brady, 928 F.2d 844 (9th Cir. 1991). In *Brady*, the jury acquitted the defendant of first degree murder and assault with intent to commit murder, but it convicted him of the lesser included offense of voluntary manslaughter. At sentencing, the court reconsidered the defendant's "state of mind" and departed upward on that basis and on the degree of planning and preparation involved in the offense. *Id.* at 850. We reversed, concluding that the Guidelines do not allow "a court to reconsider facts during sentencing that have been rejected by a jury's not guilty verdict." *Id.* at 851. "Otherwise, any time a judge disagreed with the jury's verdict, the judge could 'reconsider' critical elements of the offense to avoid the restrictions of the Guidelines and push the sentence to the maximum—in effect punishing the defendant for an offense for which he or she had been acquitted." *Id.* at 851-52.

Likewise, this case presents a situation where allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted. The jury's finding that Putra did not aid or abet in the possession of the five ounces of cocaine on May 9, 1992, is an explicit rejection of her involvement in that transaction. The sentencing court cannot, after the jury's determination on those facts, consider the facts again and conclude that Putra was indeed involved. Although the standard of proof differs for an acquittal and for sentencing, we have specifically rejected this argument as justification for considering facts underlying the jury's acquittal. In *Brady*, we held that a district court may not rely upon facts that have been rejected by a jury's not guilty verdict. *Id.* at 851 & n.12. In this case, the

district court's sentence can only be reached if the district court is allowed to disregard the jury verdict on Count 19 and substitute its own factual finding. This is clearly forbidden under *Brady*.

We note, however, that *Brady* is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines. Thus, our application of *Brady* to the circumstances of this case is very narrow. We acknowledge that *Brady* is itself limited by *United States v. Vgeri*, 51 F.3d 876 (9th Cir. 1995), and *United States v. Diaz-Rosas*, 13 F.3d 1305 (9th Cir.), cert. denied, 114 S. Ct. 1848 (1994), cases in which the defendants were convicted of the conspiracy count, but acquitted of certain possession counts. Under such circumstances, the district court may hold a defendant accountable for drugs possessed or distributed by co-conspirators, so long as it was in furtherance to jointly undertaken criminal activity and reasonably foreseeable to the defendant. See U.S.S.G. § 1B1.3, comment. (n.2). However, these cases are not applicable to the facts at hand because Putra was acquitted of the conspiracy charge and of any activity related to the cocaine involved in Count 19. In such a situation, the district court should not consider the narcotics in possession of her codefendants when setting Putra's sentence.

The Government contends that this case nonetheless fits squarely within section 1B1.3 application note 3, and that because *Brady* did not involve this section, we are not constrained by its holding. We do not agree. The jury's verdict on Count 19 under the court's instructions precludes an application of section 1B1.3 to this case because the jury's verdict

rejected Putra's participation in the Count 19 transaction in all respects. U.S.S.G. § 1B1.3 requires a finding that Putra was in some way involved in the May 9 transaction to include the offense as "relevant conduct." The jury's acquittal is a finding that Putra was not involved, did not commit, did not aid or abet, and was not engaged in the May 9, 1992 transaction.

This result is not inconsistent with application note 3 to U.S.S.G. § 1B1.3. The note states that the defendant need not be convicted of multiple offenses to be sentenced based on the aggregate amount of narcotics involved. This guidance, however, is directed to uncharged conduct where a preponderance of the evidence demonstrates the defendant's involvement; it does not address acquitted conduct. To allow the court to increase Putra's sentence based on acquitted conduct would make the jury's findings of fact pointless and contradict our holding in *Brady*. Thus, the district court erred by including the five ounces of cocaine in Count 19 to increase Putra's sentencing range.

REVERSED and REMANDED for resentencing.

WALLACE, Chief Judge, dissenting:

The majority starts toward the wrong answer by asking the wrong question: "whether a judge can sentence a defendant for a crime of which the jury found her not guilty." Opinion at 3052. Putra was not sentenced or punished for the May 9, 1992, crime. Rather, the district court sentenced her for the crime of which she was convicted, aiding and abetting possession with intent to distribute one ounce of cocaine on May 8, 1992. The issue before us is whether Putra's sentence for this crime may be increased because of her involvement in the May 9 transaction. In other words, the issue is whether Putra is accountable under section 1B1.3 of the 1991 United States Sentencing Guidelines for the five ounces of cocaine her codefendants possessed with intent to distribute on May 9. Because I believe the district court properly considered this amount in determining Putra's base offense level, I respectfully dissent.

Merely because a jury acquitted Putra on charges related to the May 9 drug transaction does not preclude the district court from including the amount of cocaine involved in that transaction in determining her base offense level. The majority, however, concludes that section 1B1.3 "does not deal with the situation where the defendant was charged with [an]other count involved and is acquitted [on that count]." *Id.* at 3054. The majority further states that section 1B1.3 "does not address acquitted conduct." *Id.* at 3056. Such sweeping language contradicts the Guidelines, our practice prior to enactment of the Guidelines, decisions of other circuits, and recent Supreme Court authority.

Section 1B1.3 allows a sentencing court to consider all "relevant conduct" in determining an appro-

priate sentencing range. Where the defendant has been charged with multiple counts grouped together pursuant to section 3D1.2(d), such as here, relevant conduct includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2).

The Application and Background Notes accompanying section 1B1.3 illustrate that the Guidelines allow sentencing courts to consider circumstances surrounding criminal activity for which a defendant was acquitted. Application Note 3 makes it clear that section 1B1.3 does not require Putra "to have been convicted of multiple counts." *Id.* at comment, n.3. The Note provides the following example:

[W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.

Id. Although the Note does not explicitly state that the hypothetical defendant was charged with and acquitted of the two other sales, it is reasonable to infer that the court dismissed or the jury acquitted the defendant on those counts. Thus, the Note reasonably can be interpreted to mean that a defendant need not be convicted of criminal activity for a court to consider that activity in determining sentencing ranges. *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992) (*Boney*).

More to the point is the Background Note to section 1B1.3, which explains that in determining what constitutes relevant conduct under subsection (a)(2), courts should consider “pattern[s] of misconduct” rather than convictions on specific counts because “the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing.” *Id.* Thus, “[r]elying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for [offenses falling under § 3D1.2(d)].” *Id.* (emphasis added).

The range of conduct amounting to “acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction” under subsection (a)(2) includes acts “committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable.” *Id.* at n.2. Application Note 2 states that a defendant is “otherwise accountable” for the “conduct of others . . . in furtherance, and reasonably foreseeable in connection with, [jointly undertaken] criminal activity.” *Id.* at comment., n.2.

The district court found that the government succeeded in showing, by a preponderance of the evidence, that Putra “was involve[d] in activity where it was reasonably foreseeable that additional [drug] activity would continue.” See *Witte v. United States*, 115 S. Ct. 2199, 2207 (1995) (*Witte*) (State need not prove facts related to the severity of punishment beyond a reasonable doubt), citing *McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986); *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994) (*Nichols*)

(State must prove conduct considered in sentencing by a preponderance of the evidence); *United States v. Restrepo*, 946 F.2d 654, 656 (9th Cir. 1991) (en banc) (Sentencing Guidelines did not alter standard of proof required of facts related to sentencing), cert. denied, 503 U.S. 961 (1992). The district court thus adopted paragraph 19 of the Presentence Report, which states:

The defendant’s presence during [the May 9] transaction constitutes relevant conduct pursuant to U.S.S.G. § 1B1.3(a)(2) in that codefendant Vassilios Liaskos’ conduct was a reasonably foreseeable act in furtherance of a jointly undertaken criminal activity, as well as part of the same course of conduct or common scheme or plan as the offense of conviction.

This finding is not clearly erroneous. See *United States v. Karterman*, 60 F.3d 576, 580 (9th Cir. 1995) (*Karterman*) (“The factual findings on which the lower court based [a sentencing] enhancement are reviewed for clear error.”); see also *United States v. Shabani*, 48 F.3d 401, 404 (9th Cir. 1995) (reviewing court should give “due deference to the district court’s application of the guidelines to the facts”). The district court based its finding on (1) Putra’s admission that she was in Vassilios Liaskos’s car when he sold cocaine to Alexander Panos on May 9; (2) Panos’s testimony that he met Putra on several occasions to purchase cocaine, including May 9; (3) testimony from Liaskos, who stated that on May 9 Putra met him only to have lunch, although he and Putra never in fact went to lunch on that day; (4) testimony from Richard Haller and Robert Blackmon, who said that Liaskos was grooming

Putra to take over his drug business; and (5) evidence compiled by a surveillance team, which photographed and watched both the May 8 and May 9 transactions. These facts provide ample evidence that Putra could reasonably foresee that Liaskos would sell cocaine to Panos on May 9 in furtherance of a jointly undertaken criminal activity, and that Putra's involvement in the May 9 transaction was part of the same course of conduct or common scheme or plan as her offense of conviction. Because the district court did not clearly err in finding that Putra was accountable for the amount of drugs sold on May 9, it had authority under section 1B1.3 to include the five ounces of cocaine sold on May 9 in determining her base offense level and corresponding sentencing range.

This result is consistent with section 1B1.3 and this court's practice prior to the enactment of the Sentencing Guidelines, when a sentencing judge could consider a wide range of evidence, "in order to tailor the punishment to the criminal rather than to the crime." *United States v. Morgan*, 595 F.2d 1134, 1136 (9th Cir. 1979) (*Morgan*); *see also Nichols*, 114 S. Ct. at 1928 (describing broad discretion traditionally exercised by sentencing courts). There is no evidence that Congress intended the Sentencing Guidelines to alter this practice.

The purpose of the Sentencing Reform Act of 1984 (Act), 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-98, "was to eliminate the 'unwarranted disparity[ies] and . . . uncertainty' associated with indeterminate sentencing." *Burns v. United States*, 501 U.S. 129, 133 (1991) (*Burns*), quoting S. Rep. No. 98-225 at 49 (1983); *see also Mistretta v. United States*, 488 U.S. 361, 363-68 (1989) (recounting the

Act's background and impact on traditional sentencing practices). While the Act "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns*, 501 U.S. at 132, the revolution was one of determinacy and procedural reform only. *Id.* at 133. Such procedural reforms injected more formality into the sentencing process, but they did not remove the discretion exercised by sentencing judges prior to the enactment of the Guidelines. *Id.* at 133; *see also* U.S.S.G. § 6A1.3, comment. (explaining that where there is a dispute over what constitutes a permissible factor, the Guidelines merely require the court to "ensure that the parties have an adequate opportunity to present relevant information," including "notify[ing] the parties of [the court's] tentative findings and afford[ing] an opportunity for correction of oversight or error before sentence is imposed"); *cf. Witte*, 115 S. Ct. at 2207 (Sentencing Guidelines did not alter sentencing court's discretion to consider uncharged relevant conduct). The Guidelines' relevant conduct provision merely channeled future discretion by recognizing that an offense is more serious when it represents part of a pattern of criminal conduct. As the decisions of other circuits have recognized, relevant conduct "corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989); *see also United States v. Mack*, 938 F.2d 678, 681 (6th Cir. 1991) (section 1B1.3 "memorizes a long standing practice of trial judges"). Pre-Guidelines practice in this court allowed judges to consider acquitted conduct in sentencing. *Morgan*, 595 F.2d at

1136; *United States v. Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973).

This should have ended the matter for us and resulted in a unanimous affirmance of the sentence. However, *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991) (*Brady*), changed this practice, without citing any authority, and used a rationale that the Supreme Court now has discredited. Should *Brady* change our analysis?

Brady held that a sentencing court may not consider facts that the jury necessarily rejected by a judgment of acquittal. *Id.* at 851. The district court had upwardly departed from the Guidelines in sentencing *Brady* for voluntary manslaughter based on his “state of mind, and the degree of planning and preparation of [the] offenses.” *Id.* at 850. *Brady* argued that the district court “effectively overrule[d]” the jury’s verdict, which convicted him of only voluntary manslaughter, not first degree murder, thereby necessarily rejecting the fact that he had the mental state to intend murder. *Id.* Accepting this reasoning, *Brady* ruled that the district court “in effect punish[ed] the defendant for an offense for which he or she had been acquitted.” *Id.* at 852. *Brady* further stated that “[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted.” *Id.* at 851. *Brady* explicitly rejected the reasoning adopted by most other courts of appeals—that a sentencing court may consider as relevant conduct acquitted conduct that the government proved by a preponderance of the evidence. *Id.* at 851 n.12; see *Boney*, 977 F.2d at 635-36; *United States v. Macciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States v. Isom*, 886 F.2d

736, 738-39 (4th Cir. 1989); *United States v. Juarez-Oretga*, 866 F.2d 747, 748-49 (5th Cir. 1989); *United States v. Masters*, 978 F.2d 281, 285-87 (7th Cir. 1992), cert. denied, 113 S. Ct. 2333 (1993); *United States v. Olderbak*, 961 F.2d 756, 764-65 (8th Cir.), cert. denied, 113 S. Ct. 422 (1992); *United States v. Rivera-Lopez*, 928 F.2d 372, 373 (11th Cir. 1991).

Nevertheless, we have reaffirmed *Brady* several times, most recently in *United States v. Watts*, 67 F.3d 790, 796 (9th Cir. 1995). See also *Karterman*, 60 F.3d at 581; *United States v. Pinkney*, 15 F.3d 825, 829 (9th Cir. 1994) (*Pinkney*); *United States v. Diaz-Rosa*, 13 F.3d 1305, 1307-08 (9th Cir.), cert. denied, 114 S. Ct. 1848 (1994). These decisions recognize that the “core rationale” of *Brady*—that we would “pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted”—is “applicable to the use of ‘facts that have been rejected by a jury’s not guilty verdict’ as a basis for enhancing a defendant’s sentence.” *Pinkney*, 15 F.3d at 829, quoting *Brady*, 928 F.2d at 851.

But can we still adhere to *Brady*, or has it been undermined by subsequent Supreme Court authority? The Court recently rejected *Brady*’s reasoning in *Witte*. Although *Witte* addressed whether section 1B1.3 includes as “relevant conduct” activity for which a defendant already has been punished for purposes of double jeopardy, its reasoning is equally applicable to the issue at hand—whether section 1B1.3 may include activity for which a defendant has been acquitted. *Witte* first recognized that relevant conduct under section 1B1.3 includes all conduct “in which the defendant was engaged and not just with

regard to the conduct underlying the offense of conviction." *Witte*, 115 S. Ct. at 2203. The Court then reaffirmed that sentencing courts traditionally had discretion to consider a defendant's past criminal behavior, "even if no conviction resulted from that behavior." *Id.* at 2205, quoting *Nichols*, 114 S. Ct. at 1928. Finally, the Court stated that "consideration of information about the defendant's character and conduct at sentencing *does not result in 'punishment' for any offense other than the one of which the defendant was convicted.*" *Witte*, 115 S. Ct. at 2207 (emphasis added). The Court continued:

To the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime on the theory that such conduct bears on the "character of the offense," the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense (which that related conduct may or may not constitute). But, while relevant conduct thus may relate to the severity of the particular crime, the commission of multiple offenses in the same course of conduct also necessarily provides important evidence that the character of the offender requires special punishment.

. . . .

The relevant conduct provisions of the Sentencing Guidelines . . . are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal

activity. . . . We hold that, where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction.

Id. at 2207-08 (emphasis in original).

The district court's sentence punishes Putra only for aiding and abetting possession with intent to distribute one ounce of cocaine. The court stated that it considered evidence concerning the May 9 transaction "to show other related acts, other similar acts which doesn't punish the person for those acts but just shows that [Putra] should be punished more for the act for which the jury did find her guilty." The district court's finding that her involvement in the May 9 transaction constitutes "relevant conduct" is supported by a preponderance of the evidence, and cannot be held to be clearly erroneous. Furthermore, its imposition of a 27-month sentence falls well within the statutory limit of 20 years. See 21 U.S.C. § 841(b)(1)(C). Thus, the district court properly determined Putra's offense level by aggregating the cocaine involved in the May 8 and May 9 transactions. Because the sentence is fully consistent with *Witte*, I would affirm the district court. *Brady* must not be considered as continuing circuit authority in light of *Witte*.

But even if *Brady* still controlled following *Witte*, the district court's sentence should be upheld under *Karterman*, which held *Brady*'s holding was narrow. *Karterman* was convicted of filing false tax returns and acquitted of conspiring to distribute cocaine and distribution of cocaine. The district court nevertheless adjusted his base offense level upward two levels

for failing to report income exceeding \$10,000 that came from criminal activity. *Karterman*, 60 F.3d at 578. Karterman argued that, because the jury necessarily found that he did not distribute or conspire to distribute cocaine, *Brady* barred the upward adjustment. We rejected this argument because “we [could not] tell what facts or evidence the jury rejected when it acquitted Karterman on [the drug conspiracy and distribution counts].” *Id.* at 581. Because “the jury might have accepted all the evidence of Karterman’s drug distribution activity but acquitted him of conspiracy because it rejected the evidence that Karterman had an agreement with another . . . the jury did not *necessarily* reject Karterman’s involvement in the substantive conduct underlying the conspiracy charge—*i.e.*, drug trafficking.” *Id.* (emphasis in original). Thus, we held that the district court could “consider[], for sentencing purposes, [] conduct that was not charged *or was not proven at trial.”* *Id.* at 582 (emphasis added). “[A] narrow interpretation [of *Brady*] is most consistent with the policy goals of the Guidelines,” which “generally permit a sentencing judge to consider evidence of conduct that was not proven beyond a reasonable doubt at trial.” *Id.* at 581.

This case is similar to *Karterman* in that we cannot tell what facts the jury necessarily rejected in acquitting Putra of aiding and abetting possession with intent to distribute five ounces of cocaine on May 9. The majority is plainly wrong in stating that “[t]he jury’s acquittal is a finding that Putra was not involved, did not commit, did not aid or abet, and was not engaged in the May 9, 1992 transaction. Opinion at 3056. Let me explain why.

First, it is undisputably true that an acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences, including the majority.

In addition, to hold Putra accountable under section 1B1.3, the district court need only find, by a preponderance of the evidence, that she committed acts that were part of the same course of conduct or common scheme or plan as the offense of conviction. Such acts may include “conduct of others in furtherance of the execution of [a] jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.” U.S.S.G. § 1B1.3, comment., n.1. There is ample evidence that allowed the district court to find that Putra either committed acts that were part of the same course of conduct or common scheme or plan as the possession with intent to distribute cocaine on May 8; or engaged in jointly undertaken criminal activity that made the May 9 transaction reasonably foreseeable to her. For example, Putra’s presence at the May 9 transaction supported Haller and Blackmon’s testimony that Liaskos was grooming Putra to take over his operation, thereby providing evidence that Putra reasonably could foresee the May 9 transaction.

This is not necessarily inconsistent with the jury’s acquittal of Putra for aiding and abetting in the possession with intent to distribute cocaine on May 9 or for conspiring to distribute a quantity of cocaine in excess of 500 grams. The jury could have acquitted Putra on the aiding and abetting charge because it

found that the government failed to prove she did not intend to commit a crime on May 9. *See* opinion at 3052-53 (restating jury instructions on aiding and abetting charge). Further, the jury could have acquitted her of the conspiracy count because it found that she conspired to distribute less than 500 grams of cocaine. Neither of these possible determinations preclude the district court from finding that Putra was sufficiently involved in the May 9 transaction to consider the five ounces of cocaine sold on that day in determining her base offense level. *See Karterman*, 60 F.3d at 581 (necessarily rejected facts under *Brady* do not include "facts that were 'possibly rejected' or even 'probably rejected'"). Thus, even if *Brady* is still good law, we should affirm the district court's sentence.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-10272

D.C. No. CR-S-93-00086-WBS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VERNON WATTS, DEFENDANT-APPELLANT

Filed January 24, 1996

Denial of Rehearing Filed April 2, 1996

Before: Betty B. Fletcher, Cecil F. Poole, and
Diarmuid F. O'Scannlain, Circuit Judges

ORDER DENYING REHEARING

The government's petition for rehearing is denied. It argues for the first time that *Witte v. United States*, ___ U.S. ___, 115 S. Ct. 2199 (1995), overrules *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991). That argument is not properly before us. The government, after requesting and being granted

an extension of time to file a petition for rehearing, elected not to do so within the extended time. It later requested that we hold the mandate so that it might brief to the court the effect of *Bailey v. United States*, ____ U.S. ___, 116 S. Ct. 501 (Dec. 6, 1995). We stayed the mandate to allow the briefing of *Bailey*. We limit our consideration of the government's arguments to those directed to *Bailey*. We find them unpersuasive. The question here is not whether the jury was wrongly instructed in light of the teachings of *Bailey*. All agree it was wrongly instructed. Watts was acquitted of the 18 U.S.C. § 924(c) offense even under the pre-*Bailey* standard that required only that the firearm was within the possession or control of the defendant and available to him thus emboldening him to commit the underlying offense. Since Watts cannot be retried, the standard under which he was acquitted is cast in concrete for this case. The rationale that precludes sentence enhancement based on the acquitted conduct is not eroded by *Bailey*. *Bailey* does not affect the outcome of this case.

APPENDIX D

[Filed Mar. 5, 1996]

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 94-10040
94-10088
94-10135
94-10136

DC No. CR-92-00784-HMF

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.

**CHERYL PUTRA, DIMITRI KONTOPIDES,
DIMITRIOS LIASKOS,* VASSILIOS LIASKOS,
DEFENDANTS-APPELLANTS**

**Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding**

**Argued and Submitted February 14, 1995
San Francisco, California**

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

MEMORANDUM **

Before: WALLACE, Chief Judge, HUG, and FARRIS, Circuit Judges.

Four codefendants convicted of various criminal violations resulting from their involvement in a lucrative narcotics operation in Hawaii appeal their convictions and sentences. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the convictions and sentences, with the exception of Putra's sentence, which we deal with in a separate opinion remanding for resentencing.

I.

Defendant Cheryl Ann Putra contends that insufficient evidence existed to support her conviction for aiding and abetting by knowingly and intentionally possessing with intent to distribute approximately one ounce of cocaine on May 8, 1992. We review the sufficiency of the evidence to determine "whether any rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. The test is whether the evidence and all reasonable inferences which may be drawn from it, when viewed in the light most favorable to the Government, sustain the verdict." *United States v. Terry*, 911 F.2d 272, 278 (9th Cir. 1990) (citation omitted).

We conclude that sufficient evidence existed to support Putra's conviction. Putra does not dispute that she was present during the narcotics transaction; rather, she contends that the Government failed to establish her involvement. However, a government

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

witness involved in the "controlled buy" testified to Putra's involvement. He testified that a woman named "Maria", whom he later identified in court as Putra, responded to his call and handled the money exchanged. The transaction was photographed by surveillance officers. Additionally, the government witnesses testified that Putra had delivered cocaine to him on several other occasions in her car. Furthermore, the car used during the narcotics exchange was rented under Putra's driver's license the day before, and Putra was listed as the spouse of Vassilios Liaskos on the rental agreement. Finally, testimony established that Vassilios Liaskos was grooming Putra to take over his narcotics business while he went to Greece for the summer. A summary of Liaskos' cellular phone records indicate 26 calls made to Putra between March 23 and May 12, 1992. Taken together, this evidence is sufficient to enable a jury to conclude beyond a reasonable doubt that Putra aided and abetted the May 8 narcotics transaction.

II.

Putra's second contention is that the district court erred in denying her motion for judgment of acquittal based on inconsistent verdicts. We review *de novo* the legal determination whether a defendant may upset a verdict because it is inconsistent with an acquittal. *United States v. Hart*, 963 F.2d 1278, 1280 (9th Cir. 1992).

The rule is well established that an inconsistent verdict is an insufficient ground on which to set aside a verdict. See *United States v. Powell*, 469 U.S. 57, 64-65 (1984); *United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974, 977-78 (9th Cir.), cert. denied,

115 S. Ct. 482 (1994). At any rate, we conclude that the verdicts are not inconsistent. While the jury found sufficient evidence to convict Putra of aiding and abetting Vassilios Liskos on May 8, there are reasons why it may have acquitted her of the conspiracy charge. In addition to the aiding and abetting charge, Putra was charged with participating in a conspiracy beginning in January 1987 until her arrest in May 1992. Quite reasonably, the jury could have found sufficient evidence to convict her of aiding and abetting the May 8 transaction, but not have found sufficient evidence of her involvement in the entire conspiracy. The district court did not err in denying her motion for judgment of acquittal.

III.

Putra's third contention is that the district erred by allowing evidence into trial of Putra's narcotic transactions with Vassilios Liaskos between 1987 and 1992. We review the admission of prior bad acts evidence under Fed. R. Evid. 404(b) for abuse of discretion. *United States v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993). We conclude that the court did not abuse its discretion.

Putra specifically objected to the admission of the testimony of Robert Blackmon and Richard Haller. However, this evidence was relevant and probative. Not only did the evidence go directly to Putra's participation in the conspiracy in which she was charged with participating, the evidence was also necessary to document the roles of the various other conspirators. Furthermore, Putra fails to establish that she was prejudiced by the admission of the evidence. See *United States v. Simas*, 937 F.2d 459, 464 (9th Cir.

1991) (defendant must indicate how evidence resulted in unfair prejudice).

IV.

Putra's fourth contention is that her conviction should be reversed because she was not arraigned in person on the fifth superseding indictment, the indictment which included the charge on which she was convicted. This argument is meritless.

We held in *United States v. Romero*, 640 F.2d 1014, 1015 (9th Cir. 1981), that a defendant must establish prejudice from a failure to follow Fed. R. Crim. P. 10 in order to be entitled to relief. Putra has not met this burden. "What is necessary is that the defendant know what [s]he is accused of and be able to adequately defend [her]self." *Id.* Her counsel indicated that he was prepared to proceed on the count and that he had "conferred extensively" with Putra prior to the trial. Furthermore, Putra failed to ask the court to arraign her in person prior to the jury's empanelment. See Fed. R. Crim. P. 10 advisory note 3 (failure to comply with rule is a mere technical irregularity not warranting reversal if not raised before trial).¹

V.

Defendant Dimitri Kontopides contends that the district court erred by allowing a government witness to testify on redirect examination about Kontopides' prior state arrest and by allowing the Government to introduce evidence of his three prior felony convictions without first balancing the probative value of the evidence against its prejudicial effect. We review the admission of prior bad acts evidence

¹ We deal with Putra's fifth contention concerning her sentence in a separate published opinion.

for abuse of discretion. *Khan*, 993 F.2d at 1376. Neither argument has merit.

First, Kontopides “opened the door” to the government agent’s testimony on redirect examination by raising the testimony himself on cross-examination. See *United States v. Hegwood*, 977 F.2d 492, 496 (9th Cir. 1992) (if defendant “opens the door,” he cannot later complain about subsequent government inquiry into the issue), cert. denied, 113 S. Ct. 2348 (1993). Kontopides introduced the evidence himself by asking the agent whether he had been present at this prior arrest. He cannot complain thereafter when the Government inquired of the agent whether the arrest was a federal or a state arrest. The court did not err by allowing that testimony.

Kontopides similarly waived his right to allege unfair prejudice on the court’s admission of his three prior felony convictions. See *United States v. Williams*, 939 F.2d 721, 725 (9th Cir. 1991) (“By bringing out the fact of the prior conviction during [] direct examination of [defendant], [defendant’s] attorney deprived the court and the government of a last chance to reverse their pre-stated positions.”). Kontopides’ counsel introduced the three prior convictions on direct examination. Furthermore, the court did not allow the Government to question Kontopides on his fourth conviction, concluding that the additional conviction did not add any probative value. The court did not abuse its discretion in allowing the Government to question Kontopides on his prior convictions.

VI.

Defendant Dimitrios Liaskos contends that the district court erred in denying the defendants’ motion for a mistrial by concluding that the Government did

not have a duty to disclose a debriefing report prepared by a detective which summarized Sergio Pangiotopoulos’ post-arrest statements. We review a denial of a mistrial for abuse of discretion, *United States v. Chan Yu-Chong*, 920 F.2d 594, 599 (9th Cir. 1990), and a *Brady v. Maryland* violation *de novo*. *United States v. Lehman*, 792 F.2d 899, 901 (9th Cir.), cert. denied, 479 U.S. 868 (1986). The court did not abuse it [sic] discretion.

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Impeachment evidence, as well as exculpatory evidence, is favorable evidence. *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988). However, reversal is only required if the evidence is material. *Id.* “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Dimitrios Liaskos has not established that the evidence was material because he has not established a reasonable probability that the result of his proceeding would have been different had the report been disclosed to him earlier. His proffered use of the report is insufficient to undermine the confidence in the outcome of his case. Pangiotopoulos did not provide any evidence against Dimitrios. The court did not err in concluding that no *Brady* violation was established.

VII.

Dimitrios Liaskos also contends that the district court erred by allowing Pangiotopoulos to testify at his sentencing hearing, thereby allowing into evidence an additional five kilograms of cocaine that Pangiotopoulos allegedly delivered to Dimitrios in 1989 and 1990. We review the district court's decision to allow testimony at a sentencing hearing for abuse of discretion. *See United States v. Upshaw*, 918 F.2d 789, 791 (9th Cir. 1990), cert. denied, 499 U.S. 930 (1991).

Dimitrios was given an opportunity to cross-examine Pangiotopoulos at the hearing, and he had ample notice that the court would consider evidence regarding Pangiotopoulos' delivery of cocaine to him. Further, Pangiotopoulos testified consistently at the sentencing hearing with the statements in the pre-sentence report. After the hearing, the district court determined by the preponderance of the evidence that Pangiotopoulos delivered a total of five kilograms of cocaine to Dimitrios. *See United States v. Restrepo*, 946 F.2d 654, 658-59 (9th Cir. 1991), cert. denied, 503 U.S. 961 (1992). The district court did not abuse its discretion in allowing this testimony.

VIII.

Defendant Vassilius Liaskos contends that the district court abused its discretion by denying his motion to dismiss his indictment, or in the alternative to exclude the testimony of George Mihailidis, on the grounds that his Fifth Amendment due process right and Sixth Amendment right to counsel were violated. The court did not abuse its discretion.

Although attorney Tashima's representation of Mihailidis after his earlier representation of Liaskos presented a potential conflict and was improper, Liaskos must establish prejudice. He has not established that he was prejudiced by either the Government's intrusion into his attorney/client relationship or by Tashima's early, brief representation of him and his later representation of Mihailidis. The district court found that Mihailidis did not provide Tashima with the source of the cocaine or its intended recipient during Tashima's initial representation of Mihailidis. In fact, Mihailidis did not mention Vassilius Liaskos to Tashima until the debriefing session in August 1992. The court further found that Tashima did not discuss any of his conversations with Liaskos with Mihailidis, Agent Alapa, AUSA Muehleck, or with any government agent or employee. Finally, the court found that nothing Tashima learned during his 1.2 hours of representation of Liaskos was used by the Government to develop evidence or further investigate Liaskos. Liaskos does not establish that these findings are clearly erroneous. As such, we conclude that Liaskos is unable to establish that he was in any way prejudiced. *See United States v. Irwin*, 612 F.2d 1182, 1185-87 (9th Cir. 1980) (mere intrusion into relationship is not enough to violate the Sixth Amendment; the intrusion must substantially prejudice the defendant).

IX.

Vassilius Liaskos next contends that the district court erred by failing to determine on the record that he had a reasonable opportunity to review his pre-sentence report with his counsel prior to sentencing. We review *de novo* whether the legal requirements

of Fed. R. Crim. P. 32 were satisfied. *United States v. Maree*, 934 F.2d 196, 199 (9th Cir. 1991). This claim is meritless.

We have held that Rule 32 only requires that the sentencing court "reasonably relies on evidence indicating that a defendant has read the presentence report and discussed it with counsel." *United States v. Lewis*, 880 F.2d 243, 245-46 (9th Cir. 1989). It is also necessary that the defendant establish prejudice and that he make an affirmative allegation that he failed to read the report. See *United States v. Davila-Escovedo*, 36 F.3d 840, 844 (9th Cir. 1994), cert. denied, 115 S. Ct. 953 (1995). Because Liaskos has done neither, we hold that the error, if any, was harmless.

X.

Vassilios Liaskos next contends that the district court erred in imposing a \$500,000 fine on him because the record does not establish that he had the ability to pay it. We review the district court's finding that he had the ability to pay for clear error. *United States v. Favorito*, 5 F.3d 1338, [sic] (9th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994).

We have reviewed the record, and we conclude that it supports a finding that Vassilios did not establish an inability to pay. The Government put forth much evidence of the lucrative dealings of Vassilios and his family members. He bought expensive real estate and cars with cash, he transferred money out of the country to relatives, and he had the ability to transfer money back into the United States. Furthermore, Vassilios failed to provide the probation office with his financial information prior to his sentencing. Without doing so, Vassilios cannot carry his burden of establishing an inability to pay. See *United States*

v. Soyland, 3 F.3d 1312, 1315 (9th Cir. 1993). As such, we conclude that the district court did not clearly err.

XI.

Vassilios Liaskos' final contention is that the district court erred in declining to depart downward on his sentence. It is well established that a district court's discretionary refusal to depart downward from the Sentencing Guidelines is not reviewable on appeal. See *United States v. Eaton*, 31 F.3d 789, 792-93 (9th Cir. 1994). Although Vassilios contends that the court mistakenly believed that it could not depart, the record establishes otherwise. Because we conclude that the record does not establish such a mistaken belief, we will not review the district court's discretionary refusal to depart downward on appeal.

AFFIRMED, except as to the sentence for Putra.

APPENDIX E

Section 3661 of Title 18 of the United States Code provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Section 1B1.3 of the Sentencing Guidelines provides:

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a con-

spiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

*Commentary**Application Notes:*

1. The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.
2. A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy. In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:
 - (i) in furtherance of the jointly undertaken criminal activity; and
 - (ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to deter-

mine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be

careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (*e.g.*, in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances

in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

Illustrations of Conduct for Which the Defendant is Accountable

- (a) *Acts and omissions aided or abetted by the defendant*
 - (1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton ~~of~~ marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of defendant who transports a suitcase

knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative

provisions under which such accountability might be established.

(b) *Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken activity and reasonably foreseeable*

(1) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking

of money was the specific objective of the jointly undertaken criminal activity).

- (c) *Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity*

- (1) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant C (*i.e.*, the forgery of the \$828 check).
- (2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally ob-

tained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.

- (3) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (*see* the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).
- (4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and

resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

- (5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (*i.e.*, the one delivery).
- (6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint

undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

- (7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.
- (8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the impor-

tation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

3. "Offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example,

where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in § 3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.

As noted above, subsection (a)(2) applies to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which § 3D1.2

(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

4. "Harm" includes bodily injury, monetary loss, property damage and any resulting harm.
5. If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. *See, e.g.,* § 2K1.4 (Arson; Property Damage by Use of Explosives); § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (*e.g.,* § 242.2 (Aggravated Assault); § 2B3.1 (Robbery)) or to actual, attempted or intended harm (*e.g.,* § 2F1.1 (Fraud and Deceit); § 2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. *See generally* § 1B1.4 (Information to be Used in Imposing Sentence); § 5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level

should be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.

6. A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in § 2S1.1, subsection (a)(1) applies if the defendant "is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in § 2A3.4(a)(2) ("If the offense was committed by the means set forth in 18 U.S.C. § 2242").

An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, § 2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under § 2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18

U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).

7. In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to § 2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under § 2X1.1(c)(1).
8. For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and *modus operandi*. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is

counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is asserted by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see § 4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

9. “Common scheme or plan” and “same course of conduct” are two closely related concepts.

(A) *Common scheme or plan.* For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*. For example, the conduct of five defendants who together defrauded a group of investors by com-

puter manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of *modus operandi* (the same or similar computer manipulations were used to execute the scheme).

(B) *Same course of conduct.* Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (e.g., a defendant’s failure to file tax returns in three consecu-

- tive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).
10. In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas § 1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by § 1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of § 3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which § 3D1.2(d) applies) often involve a pattern of misconduct that cannot

readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when § 3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to § 3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guide-

line. For example, § 2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; § 2K1.4 (Arson; property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Section 1B1.4 of the Sentencing Guidelines provides:

§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not

take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).

Section 2D1.1 of the Sentencing Guidelines provides in pertinent part:

§ 2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

- (1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960 (b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

- (2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960 (b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

- (3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

[Subsection (c) (Drug Quantity Table) omitted in printing.]

(d) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder

under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

- * * * *
- 3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to § 1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to § 2D1.1; *see* §§ 2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1).
- * * * *

- 6. Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.
- * * * *

- 12. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* § 1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (*e.g.*, sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

v.

VERNON WATTS,

Respondent,

UNITED STATES OF AMERICA,

Petitioner,

v.

CHERYL PUTRA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**MOTION FOR LEAVE TO FILE
MEMORANDUM *AMICUS CURIAE* IN
SUPPORT OF PETITIONER AND
MEMORANDUM OF MORRIS L. WHITMAN AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

NATHAN LEWIN
(*Counsel of Record*)
ALISON E. GROSSMAN
MILLER, CASSIDY, LARROCA
& LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Amicus Curiae

(i)

No. 95-1906

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

VERNON WATTS,

Respondent,

UNITED STATES OF AMERICA,

Petitioner,

v.

CHERYL PUTRA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE
MEMORANDUM *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

(ii)

Pursuant to Rule 37(b) of the Rules of this Court, Morris L. Whitman hereby moves for leave to file the attached Memorandum *Amicus Curiae*. The United States, petitioner herein, has indicated its consent to the filing of this Memorandum. The respondents have withheld their consent.

The movant is a defendant in a federal criminal case who would be directly affected by this Court's decision on the issue presented in the Solicitor General's petition. The District Judge who will be sentencing the movant on August 12, 1996, has ruled that he will include, as relevant conduct under § 1B1.3 of the Sentencing Guidelines, conduct underlying thirteen counts of bank fraud on which the movant was acquitted. Such a calculation would substantially increase the movant's sentence.

Respondents' counsel have indicated to the movant's undersigned attorney that they do not intend to file any response to the Solicitor General's petition. Accordingly, the Court will have no argument before it on the merits of the petition. We believe, for reasons summarized in our Memorandum, that the legal issue presented by the Solicitor General warrants plenary consideration by this Court, but that, on the merits, the Ninth Circuit is correct and should be affirmed.

(iii)

Since no response has been filed in this case and the disposition of this case will affect the sentence imposed on the movant and will assuredly affect many other sentences imposed in district courts around the country, we ask leave to file the attached Memorandum *Amicus Curiae*.

Respectfully submitted

Nathan Lewin
(*Counsel of Record*)
Alison E. Grossman
Miller, Cassidy, Larroca
& Lewin, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Amicus Curiae

June 1996

TABLE OF CONTENTS

	<i>Page</i>
MOTION FOR LEAVE TO FILE MEMORANDUM AMICUS CURIAE IN SUPPORT OF PETITIONER	(i)
TABLE OF AUTHORITIES	(v)
INTRODUCTION	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	7

TABLE OF AUTHORITIES

	<i>Page(s)</i>
CASES:	
<i>Dowling v. United States,</i> 493 U.S. 342 (1990)	5
<i>United States v. Bass,</i> 404 U.S. 336 (1971)	6
<i>United States v. Concepcion,</i> 983 F.2d 369 (2d Cir. 1992), <i>cert. denied sub nom. Frias v. United States,</i> 114 S. Ct. 163 (1993)	4, 5
<i>United States v. Cutler,</i> 36 F.3d 406 (4th Cir. 1994)	6
<i>United States v. DiFrancesco,</i> 449 U.S. 117 (1980)	4, 5
<i>United States v. Duncan,</i> 918 F.2d 647 (6th Cir. 1990), <i>cert. denied</i> , 500 U.S. 933 (1991)	2
<i>United States v. Martinez,</i> 946 F.2d 100 (9th Cir. 1991)	6
<i>United States v. R.L.C.,</i> 503 U.S. 291 (1992)	6

<i>United States v. Scott,</i> 437 U.S. 82 (1978)	5
<i>United States v. Silverman,</i> 976 F.2d 1502 (6th Cir. 1992), <i>cert. denied</i> , 507 U.S. 990 (1993)	2, 5
<i>United States v. Wise,</i> 976 F.2d 393 (8th Cir. 1992), <i>cert. denied</i> , 507 U.S. 989 (1993)	5

STATUTES:

18 U.S.C. ch. 1, pt. A § 1B1.3 (1996)	4
---	---

RULES:

S. Ct. R. 37(2)(b)	2
--------------------------	---

No. 95-1906

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

VERNON WATTS,

Respondent,

UNITED STATES OF AMERICA,

Petitioner,

v.

CHERYL PUTRA,

Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MEMORANDUM OF MORRIS L. WHITMAN AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

INTRODUCTION

This Memorandum is submitted pursuant to Rule 37(2)(b) of the Rules of this Court on behalf of Morris L. Whitman, a defendant currently awaiting sentence in the United States District Court for the Western District of Tennessee on five counts of bank fraud (18 U.S.C. § 1344) after a trial in which he was also acquitted on thirteen counts of bank fraud. We support the United States' request that this Court review the decision of the Court of Appeals for the Ninth Circuit, but we believe that the decision below should be affirmed. In the Sixth Circuit, where Mr. Whitman will be sentenced on August 12, 1996, the rule is that charges on which Mr. Whitman was acquitted may be deemed "relevant conduct" for purposes of sentencing. See *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991); *United States v. Silverman*, 976 F.2d 1502 (6th Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 990 (1993). The District Judge has already ruled that he will calculate Mr. Whitman's sentence to include, as "relevant conduct," the thirteen counts of bank fraud on which Mr. Whitman was found not guilty by the jury. This calculation will substantially increase Mr. Whitman's sentence.

If the Court grants the government's petition for a writ of certiorari, we will seek to file a brief *amicus curiae* supporting affirmance of the decision of the Court of Appeals for the Ninth Circuit.

STATEMENT

Mr. Whitman, long a respected and active businessman in Memphis, was indicted in the United States District Court for the Western District of Tennessee on January 29, 1993, on seventeen counts of bank fraud in violation of 18 U.S.C. § 1344. Each of the seventeen counts involved a loan or an attempt to obtain a loan for which Mr. Whitman had applied between March 1990 and June 1992 to purchase real estate, to maintain his real estate investments, or to pay for personal needs. Nine of the loans enumerated in the indictment were secured by real estate, and eight others were unsecured. The seventeen loans involved eleven different banks. The indictment alleged that, with respect to each of the seventeen loans, one or more false representations regarding Mr. Whitman's past or future income was misrepresented to the lending institution.

After a five-week jury trial, the jury returned a verdict finding Mr. Whitman guilty on five counts and not guilty on twelve counts. (Another bank fraud count in a separate indictment returned in the Eastern District of Louisiana was tried together with the 17-count Tennessee indictment. Mr. Whitman was also acquitted on the Louisiana count.) The five counts on which he was found guilty concerned three unsecured loans for which he had applied between April 1992 and June 1992.

During a two-day sentencing hearing held on June 17 and 18, 1996, the District Judge (Jerome Turner, J.) ruled that, in view of the Sixth Circuit's rule permitting district courts to treat "acquitted conduct" as "relevant conduct" under § 1B1.3 of the Sentencing Guidelines, he would calculate Mr. Whitman's offense level to include the twelve acquitted acts of alleged bank fraud in the Tennessee indictment and the single acquitted act of alleged bank fraud

in the Louisiana indictment because of the judge's conclusion that, notwithstanding the jury's verdict, fraud had been proved on these charges by a preponderance of the evidence. Sentencing was set for August 12, 1996.

ARGUMENT

Section 1B1.3 of the Sentencing Guidelines does not explicitly authorize a sentencing court to treat an allegation on which a defendant has gone to trial and been acquitted as "relevant conduct" for sentencing purposes. The eleven Courts of Appeals that have ruled that "acquitted conduct" may be the basis for an enhanced sentence (see Pet. for Cert., p. 8, n.2) have done so because they have read the language of § 1B1.3 broadly.

To be sure, the Commentary to § 1B1.3 states that the defendant need not "have been convicted of multiple counts" to have his conduct included in the sentencing calculation. The Commentary also says that "conviction under the statute is not required." But this language does not necessarily mean that "*acquitted* conduct" is to be included. Indeed, the Sentencing Commission did not explicitly resolve the issue notwithstanding circulation of a proposal on the subject. See *United States v. Concepcion*, 983 F.2d 369, 394 (Newman, J., dissenting) (2d Cir. 1992), cert. denied sub nom. *Frias v. United States*, 114 S. Ct. 163 (1993). Conduct that is never made the basis of a criminal charge may be included in the sentencing calculation while alleged conduct resulting in a charge on which the defendant was *acquitted* should be excluded.

This Court has noted the "special weight" given to a jury's acquittal. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). A jury acquittal is not simply a formal

statement that guilt has not been proved beyond a reasonable doubt. It carries "particular significance" (*United States v. Scott*, 437 U.S. 82, 91 (1978)) as the outcome of a litigated battle between the prosecution and the defense over the particularized charge. To permit the prosecution to disadvantage an accused after a jury has weighed the evidence and ruled in the defendant's favor is to give undue weight to an allegation made by a party with "superior resources" that can "wear down a defendant." *United States v. DiFrancesco*, 449 U.S. at 130; see also *Dowling v. United States*, 493 U.S. 342, 355 (1990) (Brennan, J., dissenting) "strong public interest in protecting individuals against governmental overreaching"). See also the dissenting opinions of Chief Judge Arnold of the Eighth Circuit in *United States v. Wise*, 976 F.2d 393, 405-13 (8th Cir. 1992), cert. denied, 507 U.S. 989 (1993), of Chief Judge Merritt of the Sixth Circuit in *United States v. Silverman*, 976 F.2d at 1525, and of Circuit Judge Newman of the Second Circuit in *United States v. Concepcion*, 983 F.2d at 393.

This Court should grant the writ of certiorari and review this important question of construction that arises under the Sentencing Guidelines. As Mr. Whitman's case demonstrates, the issue arises in contexts other than indictments for multiple drug transactions, in which a jury finds an accused guilty on some counts and, for no apparent reason, acquits on other counts. A second situation in which the issue frequently arises is when a jury finds a defendant guilty of a substantive offense but, possibly in order to satisfy a reluctant juror or in order to be merciful, the jury acquits in the face of strong evidence on the accompanying charge of possessing a firearm while committing the offense. These cases are different from a case like Mr. Whitman's, in which a jury has acquitted him of fraud in thirteen independent loan transactions even while finding that he was

guilty in five distinct loan applications. Nonetheless, he is in jeopardy of being sentenced as if he had been found guilty on all counts of both indictments. His situation, in this regard, parallels that of the accused in the cartoon from *The New Yorker* magazine of June 17, 1996, which appears as an Appendix to this Memorandum.

Since the Guidelines do not explicitly authorize a sentencing court to consider "acquitted conduct" in the sentencing calculation, courts should be barred from using such conduct to enhance a defendant's sentence. The same "rule of lenity" that applies to criminal statutes and requires Congress explicitly to spell out terms that will harm a criminal accused (*e.g.*, *United States v. Bass*, 404 U.S. 336, 347 (1971)) should foreclose a construction of the Guidelines that increases the imprisonment meted out to convicted defendants so long as the draftsmen of the Guidelines do not spell out and explicitly provide for such enhancement. *See, e.g.*, *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (rule of lenity applied "to answer questions about the severity of sentencing"); *United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994) ("the rule may be applied in the context of the Sentencing Guidelines"); *United States v. Martinez*, 946 F.2d 100, 102 (9th Cir. 1991) ("rule of lenity requires that we infer the rationale most favorable to the appellants and construe the guidelines accordingly").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. On plenary consideration, the judgment should be affirmed.

Respectfully submitted

NATHAN LEWIN
(*Counsel of Record*)
ALISON E. GROSSMAN
MILLER, CASSIDY,
LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Amicus Curiae

June 1996

APPENDIX

APPENDIX

87



*"Since this is only your first offense, and you've been found
not guilty, I'll be lenient in my sentencing."*

© 1996 by *The New Yorker Magazine, Inc.*

Supreme Court, U.S.
F I L E D
SEP 25 1996

(3)
No. 95-1906
CLERK

In The
Supreme Court of the United States
October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,
v.

VERNON WATTS,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,
v.

CHERYL PUTRA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENT WATTS' BRIEF IN OPPOSITION

CHARLES M. BONNEAU
980 Ninth Street
Suite 1400
Sacramento, CA 95814
(916) 444-8828

Attorney for Vernon Watts

24 P.P.
ex/

QUESTION PRESENTED

Whether a court sentencing a defendant for the offense of conviction may consider conduct underlying a charge of which the defendant was acquitted.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE AND FACTS	2
REASONS FOR DENYING THE PETITION.....	3
A. Certiorari Should Not Be Granted to Resolve an Issue Which Is Within the Jurisdiction of the United States Sentencing Commission to Resolve, and Which Is Currently Under Review by the Sentencing Commission	3
B. There Is a Split in Circuit Court Authority on the Acquitted Conduct Issue.....	7
C. A Grant of Certiorari in This Case Would Have Constitutional Implications Beyond Those Suggested by the Government.....	9
D. The Present Case Is an Awkward and Inappropriate Vehicle for Resolution of the Acquitted Conduct Issue.....	14
CONCLUSION	15
APPENDIX A	A1
APPENDIX B.....	B1

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984).....	10
<i>Ashe v. Swenson</i> , 397 U.S. 436 (1970)	11
<i>Bailey v. United States</i> , 116 S.Ct. 501 (1995)	14
<i>Braxton v. United States</i> , 500 U.S. 344 (1991).....	4, 6
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981)	10
<i>Darden v. Wainwright</i> , 447 U.S. 168 (1986)	10
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968).....	13
<i>Green v. United States</i> , 355 U.S. 184 (1957)	9
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986).....	13
<i>United States v. Boney</i> , 977 F.2d 624 (D.C. Cir. 1992)	8
<i>United States v. Brady</i> , 928 F.2d 844 (9th Cir. 1991) ..	4, 8
<i>United States v. Diaz-Rosas</i> , 13 F.3d 1305 (9th Cir.), cert. denied, 114 S.Ct. 1848 (1994).....	11
<i>United States v. Halper</i> , 490 U.S. 435 (1989)	9
<i>United States v. Lanoue</i> , 71 F.3d 966 (1st Cir. 1995)	8
<i>United States v. Lombard</i> , 72 F.3d 170 (1st Cir. 1995) ..	12
<i>United States v. Perez</i> , 858 F.2d 1272 (7th Cir. 1988)	8
<i>United States v. Putra</i> , 78 F.3d 1386 (9th Cir. 1996)	8
<i>United States v. Rodriguez-Gonzalez</i> , 899 F.2d 180-182 (2d Cir.), cert. denied, 498 U.S. 844 (1990)	8
<i>United States v. Torres-Rodriguez</i> , 930 F.2d 1375 (9th Cir. 1991)	14
<i>United States v. Tucker</i> , 404 U.S. 443 (1972).....	12

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Vgeri</i> , 51 F.3d 876 (9th Cir. 1995)	11
<i>Williams v. New York</i> , 337 U.S. 241 (1949).....	10
<i>Witte v. United States</i> , 515 U.S. ___, 132 L.Ed.2d 351, 115 S.Ct. 2199 (1995).....	10, 11
 STATUTES AND REGULATIONS	
18 U.S.C. 924(c)	2, 14
21 U.S.C. 841(a)(1).....	2
28 U.S.C. 1254(1)	1
 California Penal Code	
§ 851.8(e).....	12
 Sentencing Guidelines:	
§ 1B1.3.....	3
§ 2D1.1(b)(1)	2, 14
§ 3D1.2(d).....	3
 OTHER	
 United States Constitution	
Fifth Amendment.....	2, 13
Sixth Amendment	2

RESPONDENT WATTS' BRIEF IN OPPOSITION

Respondent Watts requests that this Court deny the Government's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The opinion of the Court of Appeals appears at 67 F.3d 790 and at Appendix A to the Petition for Writ of Certiorari.

Certiorari should be denied because the issue posed is one which should be addressed in the first instance administratively by the United States Sentencing Commission. The Sentencing Commission is currently considering proposed Guideline amendments to address the use of acquitted conduct in sentencing proceedings. The Government suggests that there is an underlying constitutional issue which merits review by this Court. Even conceding that a constitutional issue is presented, any such issue would involve more provisions of the Constitution than suggested by the Government, and would have a different result than that proposed by the Government. Finally, this is not an appropriate case for certiorari review because the jury instructions defining firearm use, on which Mr. Watts was tried and acquitted, have been disapproved by a recent decision of this Court. Any decision by this Court based on the disapproved jury instructions would be confusing and unhelpful to courts in future prosecutions under newer jury instructions.

JURISDICTION

The Government invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions cited by the Government, Respondent Watts relies on the Fifth and Sixth Amendments to the United States Constitution, and 18 U.S.C. 924(c), which are reproduced in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE AND FACTS

Respondent Watts was convicted of possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and acquitted of using or carrying a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c). Despite the acquittal on the firearm charge, his prison sentence was enhanced under Guideline Section 2D1.1(b)(1), for possession of a dangerous weapon.

On appeal it was held that the sentencing court in imposing a sentence enhancement for possession of a dangerous weapon relied upon facts which were necessarily rejected by the jury's acquittal, that such an enhancement would violate a Ninth Circuit rule against such use of acquitted conduct, and that a remand for resentencing was necessary.

At trial evidence was presented that a house was searched by narcotics agents who had been following Mr. Watts at the direction of his probation officer. The house was occupied by Mr. Watts' girlfriend Sonja Lee. Officers found crack cocaine in the kitchen cabinet of the house.

R.T. 92.¹ In a closet of the master bedroom the officers found a .380 semi-automatic pistol and a .22 caliber rifle. R.T. 96. Mr. Watts was arrested in another part of town, but he was found to have a garage door opener and the keys to Ms. Lee's house on his person, and some documents addressed to him were found in the house. R.T. 100-107. In an interrogation at the time of the arrest, Mr. Watts stated that the drugs and guns in the house belonged to him. R.T. 242.

Ms. Lee testified that the guns found in the closet were given to her after her great-grandfather's death a couple of years earlier. R.T. 336.

REASONS FOR DENYING THE PETITION

- A. Certiorari Should Not Be Granted to Resolve an Issue Which Is Within the Jurisdiction of the United States Sentencing Commission to Resolve, and Which Is Currently Under Review by the Sentencing Commission.**

The Government points to a split in authority among the circuits of the United States Courts of Appeals on the issue of whether acquitted conduct may be the source of a sentence enhancement under the United States Sentencing Guidelines. Pet. 8-9. The Guidelines are not clear on this question. Application Note 3 of the Commentary to Guideline 1B1.3, "Relevant Conduct," refers to offenses "for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple

¹ Citations are to the record before the Court of Appeals.

counts." According to the Commentary, "Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts." However, the Commentary does not speak specifically to the situation in which the defendant has been tried and acquitted of conduct for which a sentence enhancement is sought.

The Government recognizes that this is an issue for decision by the Sentencing Commission in the first instance. As stated in the Petition, "We had refrained from seeking this Court's intervention, however, because the Ninth Circuit stated in *Brady* that its rule was based on an interpretation of the Guidelines, *Brady*, 928 F.2d at 852 n. 14, and it therefore appeared to raise an issue for the Sentencing Commission to address under *Braxton v. United States*, 500 U.S. 344, 348-349 (1991). . . ." Pet. 9.

Indeed the Sentencing Commission is very aware of the split in authority created by *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991) and its progeny. For the past several years the Commission has identified the split of authority and has published the conflicting authority in a public document entitled "Ongoing Circuit Conflicts." See Appendix B to this Response.

The Commission has now gone beyond merely identifying the split in authority. On July 2, 1996, the Commission announced its intention to consider modifications to the sentencing guidelines, including the use of "acquitted conduct" as "relevant conduct" for a Guideline sentence enhancement. The announcement appears in the Federal Register at 61 Fed. Reg. 34465.

In 1995, the Commission announced that it was initiating a multi-year project to comprehensively assess and simplify provisions of the Guidelines Manual. See 60 F.R. 49316-17 (Sept. 22, 1995). After considering a number of staff papers and input from interested individuals and groups, the Commission anticipates focusing its attention and possible amendment consideration on the following specific issues:

Relevant Conduct. Priority issues for the 1996-97 amendment cycle include: (1) clarifying/streamlining the relevant conduct guideline assuming no substantive policy changes; and (2) developing options to limit the use of acquitted conduct at sentencing. Issues of lower priority that may be further explored during future amendment cycles include: (1) substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence; and (2) increasing the burden of proof at sentencing to a "clear and convincing" standard.

61 Fed. Reg. 34465

Under this announcement acquitted conduct is a "priority issue" for resolution in the 1996-97 amendment cycle. In the normal course of business this should result in a proposed amendment to be presented to the United States Congress by May 1, 1997, for adoption by November 1, 1997. The notes of the Commission meeting of July 1, 1996, include three sets of proposed amendments to address the acquitted conduct issue. Under Option 1, acquitted conduct may be considered to set the Guideline range and to base an upward departure, but only if the

conduct is established independent of evidence introduced at trial. Under Option 2, acquitted conduct may be considered in setting the Guideline range, but only if the sentencing court employs a "clear and convincing" standard of proof rather than the "preponderance of the evidence" standard employed in other sentencing decisions. Under Option 3, acquitted conduct is to be considered using the same standard as other evidence of unconvicted conduct, but with a discretionary downward departure to account for issues of "fundamental fairness."

The Commission, therefore, is addressing the "acquitted conduct" issue which is posed by the Government's Petition for Writ of Certiorari in the present case. The Guideline amendment on acquitted conduct may coincide with or precede any opinion this Court may deliver in the present case, should certiorari be granted.

In *Braxton v. United States, supra*, this Court indicated that certiorari should not be granted in such a situation.

"... Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest. This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts; but there is even further indication that we ought to adopt that course. In addition to the *duty* to review and revise the Guidelines, Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments

reducing sentences will be given retroactive effect, 28 USC § 994(u). This power has been implemented in USSG § 1B1.10, which sets forth the amendments that justify sentence reduction.

We choose not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2. . . .

500 U.S. at 348-349.

The Sentencing Commission is currently addressing the question of whether acquitted conduct may be considered "relevant conduct" under Guideline § 1B1.3. This court should not intervene in a question which is soon to be resolved by Guideline amendment.

B. There Is a Split in Circuit Court Authority on the Acquitted Conduct Issue.

The Government is correct in its observation that there is a split of authority among the circuits, with the majority disagreeing with the position taken by the Ninth Circuit that use of acquitted conduct for sentence enhancement should not be allowed. See authorities cited in footnotes 2, 3, and 5 of Petition. Two caveats must be made to this observation, however.

First, the circuits other than the Ninth, which have adopted the position that acquitted conduct may be used to enhance a Guideline sentence, have not done so uniformly or without misgivings. The Seventh Circuit has observed that acquitted conduct may be considered in sentencing but should not be used as the sole basis for a

sentence enhancement. *United States v. Perez*, 858 F.2d 1272, 1277 (7th Cir. 1988). A panel of the First Circuit has recognized the constitutional implications of permitting such sentence enhancements.

" . . . [W]e believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him. Moreover, we believe that the Guidelines' apparent requirement that courts sentence for acquitted conduct utterly lacks the appearance of justice. This panel urges the court to reconsider en banc the issue of acquitted conduct when it is next squarely presented."

United States v. Lanoue, 71 F.3d 966, 984 (1st Cir. 1995).

Second, although some other circuits have addressed constitutional arguments in the course of their opinions, e.g. *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992) and *United States v. Rodriguez-Gonzalez*, 899 F.2d 180-182 (2d Cir.), cert. denied, 498 U.S. 844 (1990), the Ninth Circuit has not treated this as a constitutional issue. The Government points to a sentence in *United States v. Putra*, 78 F.3d 1386 (9th Cir. 1996), in which the court states, "We note, however, that *Brady* is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines. Thus, our application of *Brady* to the circumstances of this case is very narrow." No portion of *Brady* or its progeny cites or relies on any portion of the Constitution. Rather, the Ninth Circuit has chosen to interpret the

Guidelines to forbid the use of acquitted conduct and, beyond that, it has promulgated a judicial rule designed to give the highest collateral effect to a jury's acquittal. The Ninth Circuit has not promulgated a rule of constitutional interpretation. The conflict between circuits pointed to by the Government is at an administrative, not a constitutional, level.

C. A Grant of Certiorari in This Case Would Have Constitutional Implications Beyond Those Suggested by the Government.

Although there is not now a Circuit conflict of constitutional dimensions, a grant of certiorari would automatically trigger a debate on constitutional grounds. This debate would not be as simple as the Government suggests, and would in fact impact other constitutional provisions with results not foreseen in the Government's brief.

1. Double Jeopardy. "[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989). Despite this observation, this Court has seldom had occasion to review convictions obtained or punishment imposed following an acquittal on charges involving the same conduct. For one exception, see *Green v. United States*, 355 U.S. 184 (1957), holding that a successful appeal from conviction on a lesser included offense cannot lead to retrial on the greater offense, where the jury in the first trial impliedly

acquitted the defendant of the greater charge by failing to return a verdict on the greater charge.² The present case would apply that prong of the double jeopardy analysis dealing with punishment following an acquittal.

The Government seeks to rely upon this Court's recent decision in *Witte v. United States*, 515 U.S. ____ 132 L.Ed.2d 351, 115 S.Ct. 2199 (1995). The *Witte* decision, arising under the Sentencing Guidelines, was governed by that prong of Double Jeopardy analysis which deals with an attempt to punish criminally a second time for the same offense. 132 L.Ed.2d at 361. Under that prong, conduct for which the defendant has already suffered a Guideline sentence enhancement may be subsequently charged in a separate proceeding leading to a conviction. 132 L.Ed.2d at 365. This Court cautioned that, as a matter of Guideline interpretation, in the second sentencing proceeding the trial court must take into account the previous sentence involving the same conduct. 132 L.Ed.2d at 367. The *Witte* analysis did not deal with acquitted conduct, and did not decide whether acquitted conduct

² *Williams v. New York*, 337 U.S. 241 (1949) cited by the Government at Pet. 10, involved the use in a death penalty prosecution of information of some 30 burglaries committed by the defendant which did not result in conviction. That case did not involve acquitted conduct, and it therefore should not be cited in the present context. The continued validity of *Williams v. New York* is at least questionable in view of this Court's current requirement of "heightened reliability" in the imposition of death judgments. *Darden v. Wainwright*, 447 U.S. 168, 179-183 (1986). This Court has forbidden the relitigation of issues in death penalty proceedings which have previously led to acquittal. *Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984) and *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

can ever become "relevant conduct" under the Sentencing Guidelines. Furthermore, the Ninth Circuit in its *Watts* opinion did not consider the *Witte* opinion because the Government failed to bring it up by timely briefing. The application of *Witte* in this context, if any, should not be addressed by this Court until the circuit courts of appeal have had the opportunity to apply it.

Consistent with the Double Jeopardy Clause, a jury acquittal must foreclose any form of prison punishment for the same conduct.

2. Collateral Estoppel. Collateral estoppel is "a part of the Fifth Amendment's guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 442-443 (1970). "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' [fn.]" 397 U.S. at 443-444.

The careful comparison of the acquitted charge with the proposed sentence enhancement is an essential part of the *Brady* rule. See *United States v. Vgeri*, 51 F.3d 876 (9th Cir. 1995) and *United States v. Diaz-Rosas*, 13 F.3d 1305 (9th Cir.), cert. denied, 114 S.Ct. 1848 (1994), in which drug

quantities were allowed to support sentencing enhancements because not included in the count of acquittal. This aspect of the constitutional guarantee against collateral estoppel should be included in any final resolution of the acquitted conduct issue.

3. Due Process. Use of acquitted conduct also has implications under the Due Process Clause. The integrity of our system of justice cannot be maintained without giving substantial effect and credit to a jury acquittal. To permit the Government to make an "end run" around the jury verdict and obtain the same sentence despite an acquittal would tend to make the jury trial system an irrelevant formality. See the discussion in *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995), forbidding imposition of a Guideline life term on a firearm offense for a related homicide on which the defendant had already been tried and acquitted in state court. Similar Due Process considerations have led this Court to declare that a prior conviction cannot be used as a sentencing factor when it is demonstrated that the prior conviction was obtained without the assistance of counsel. *United States v. Tucker*, 404 U.S. 443 (1972).

The common law demonstrates a deep respect, even reverence, for the implications of a jury acquittal. Although it is often said that a verdict of not guilty is not a finding of innocence, quite the opposite is true in practice; an acquittal is very often treated as an exoneration, far beyond the restrictions of double jeopardy. See, for example, California Penal Code § 851.8(e), providing that on a judgment of acquittal the trial judge may find the defendant "factually innocent." All law enforcement

agencies are then ordered to seal and destroy all records of the arrest and prosecution.

Under the Due Process Clause of the Fifth Amendment to the United States Constitution the use of acquitted conduct for sentence enhancement must be forbidden.

4. Right to Jury Trial. The primary functions of the right to trial by jury are to prevent oppressive and arbitrary actions by the government and to avoid prosecutorial unfairness. *Duncan v. Louisiana*, 391 U.S. 145, 149-150 (1968). These functions are denigrated by the use of acquitted conduct as a sentencing enhancement. Although sentencing enhancements may be imposed in some situations in the absence of any jury trial, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), once there has been a jury trial and an acquittal the verdict must be respected. To permit imposition of a similar penalty by other means renders the entire jury trial pointless and has an obvious detrimental effect on the jury trial as an institution.

For these reasons, the argument which the Government proposes to unleash has wide constitutional ramifications. The result cannot be confined to the narrow formality proposed by the Government. The sentence enhancement involved in this case must be disallowed in order to protect fundamental rights to due process and jury trial and protection against double jeopardy.

D. The Present Case Is an Awkward and Inappropriate Vehicle for Resolution of the Acquitted Conduct Issue.

Trial was held in this matter in November and December of 1993. The jury was instructed under the then-current definition of firearm use under 18 U.S.C. § 924(c), which required only that the firearm was within the possession or control of the defendant and available to him thus emboldening him to commit the underlying offense. See *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991). On December 6, 1995, this Court rendered its decision in *Bailey v. United States*, 116 S.Ct. 501. *Bailey* established a new standard for prosecutions under § 924(c). Under *Bailey* the defendant must be found to have "carried" or "actively employed" the firearm in the course of the offense in order to be subject to conviction under § 924(c).

The dangerous weapon enhancement Guideline, § 2D1.1(b)(1), requires only that the weapon was possessed, "unless it is clearly improbable that the weapon was connected with the offense." Commentary, Application Note 3. The Guideline language applied by the sentencing court in the present case was similar to the language of the jury instruction under which Mr. Watts was acquitted. Thus there is roughly parallel language for the constitutional analysis, should this Court undertake it. However the pre-*Bailey* language will not be read in future trials. Therefore, certiorari should not be granted because the resulting decision would create confusion for lower courts, which are now operating in the post-*Bailey* era. What effect should be given to a § 924(c) acquittal in the post-*Bailey* era? The conduct defined in a post-*Bailey*

prosecution (use) is much narrower than the conduct proscribed by the Guideline (mere possession). Therefore, courts in the future would not find guidance from this case when faced with an acquittal under the new definition for firearm use.

For this reason as well, this Court should deny certiorari.

CONCLUSION

This is an issue for decision in the first instance by the United States Sentencing Commission. When the Commission has completed its revision of the Guideline there may be no further conflict between the Circuits and no latent constitutional issues. For all of the reasons stated the Petition for Certiorari should be denied.

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Respondent
Vernon Watts

September 1996

APPENDIX A
U.S. Constitution
AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution
AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 924 (1993 version)

* * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C.App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

APPENDIX B

**UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529**

[seal]

ONGOING CIRCUIT CONFLICTS

Prepared by

the General Counsel's Office,
U.S. Sentencing Commission

May 2, 1994

Disclaimer: Information provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission and should not be considered a definitive statement of the law.

Note: Case citations do not include information regarding denial of certiorari.

ONGOING CIRCUIT CONFLICTS -- PART I

The following circuit conflicts involve conflicts regarding guideline interpretation and could be resolved directly by amendment of the guidelines.

GUIDELINE ISSUE	CIRCUIT DECISION YES	CIRCUIT DECISION NO
§1B1.3 (Acquitted Conduct and Relevant Conduct)	<p>First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C.</p> <p>Whether relevant conduct may include acquitted conduct. (See proposed amendment 18, considered by Commission in 1994 cycle.)</p>	<p>Ninth</p> <p><u>United States v. Moccia</u>, 891 F.2d 13 (1st Cir. 1989)</p> <p><u>United States v. Rodriguez-Gonzalez</u>, 899 F.2d 177, 180-81 (2d Cir. 1990)</p> <p><u>United States v. Isom</u>, 886 F.2d 736, 738-39 (4th Cir. 1989)</p> <p><u>United States v. Juarez-Ortega</u>, 866 F.2d 747, 748-49 (5th Cir. 1989)</p> <p><u>United States v. Duncan</u>, 918 F.2d 647, 652 (6th Cir. 1990)</p> <p><u>United States v. Masters</u>, 978 F.2d 281, 285-86 (7th Cir. 1992) ("implicit" acquitted conduct)</p> <p><u>United States v. Dawn</u>, 897 F.2d 1444 (8th Cir. 1990)</p> <p><u>United States v. Coleman</u>, 947 F.2d 1424, 1429 (10th Cir. 1991)</p> <p><u>United States v. Rivera-Lopez</u>, 928 F.2d 372 (11th Cir. 1991) (<i>per curiam</i>)</p> <p><u>United States v. Boney</u>, 977 F.2d 624 (D.C. Cir. 1992)</p>
§1B1.3; §5K2.0 (Acquitted Conduct and Upward Departure)	<p>Third, Seventh, Tenth</p> <p>Whether an upward departure may include acquitted conduct. (See proposed amendment 18, considered in 1994 cycle.)</p>	<p>Ninth</p> <p><u>United States v. Ryan</u>, 866 F.2d 604, 608-09 (3rd Cir. 1989)</p> <p><u>United States v. Fomner</u>, 920 F.2d 1330, 1332-33 (7th Cir. 1990)</p> <p><u>United States v. Kelly</u>, 1 F.3d 1137, 1141 n.3 (10th Cir. 1993)</p>

FILED

OCT 15 1996

NOV 1

PAGE 1

(4)

No. 95-1906

CLERK

In the Supreme Court of the United States**OCTOBER TERM, 1996**

UNITED STATES OF AMERICA, PETITIONER*v.***VERNON WATTS**

UNITED STATES OF AMERICA, PETITIONER*v.***CHERYL PUTRA**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
Department Of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10 pp/

TABLE OF AUTHORITIES

Cases	Page
<i>Bailey v. United States</i> , 116 S. Ct. 501 (1995)	2
<i>Braxton v. United States</i> , 500 U.S. 344 (1991) ...	5
<i>Koon v. United States</i> , 116 S. Ct. 2035 (1996)	7
<i>Mabry v. Johnson</i> , 467 U.S. 504 (1994)	3
<i>United States v. Blake</i> , 88 F.3d 824 (9th Cir. 1991)	3
<i>United States v. Brady</i> , 928 F.2d 844 (9th Cir. 1991)	5, 6, 7
<i>United States v. Duran</i> , 15 F.3d 131 (9th Cir. 1994)	7-8
<i>United States v. Montenegro-Rojo</i> , 908 F.2d 425 (9th Cir. 1990)	3
<i>United States v. Pinkney</i> , 15 F.3d 825 (9th Cir. 1994)	7
<i>United States v. Sherpa</i> , Nos. 95-50007 & 95-50054, 1996 WL 571175 (9th Cir. Oct. 8, 1996) .	6, 7
<i>United States v. Smith</i> , 991 F.2d 1468 (9th Cir. 1993)	3
<i>United States v. Walsh</i> , 985 F.2d 577 (9th Cir. 1991)	6
<i>Witte v. United States</i> , 115 S. Ct. 2199 (1995)	8
 Statutes and regulations:	
18 U.S.C. 924(c)	2
18 U.S.C. 3553(f)(5)	7
18 U.S.C. 3583(a)	3
18 U.S.C. 3742(a)	6
28 U.S.C. 994(o)	5
 Sentencing Guidelines (Nov. 1, 1995):	
§ 1B1.3	4, 5
§ 2D1.1(b)(1)	2
§ 5C1.2	7
§ 5C1.2(5)	7
 Miscellaneous:	
61 Fed. Reg. 34,465 (1996)	3-4

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1906

UNITED STATES OF AMERICA, PETITIONER

v.

VERNON WATTS

UNITED STATES OF AMERICA, PETITIONER

v.

CHERYL PUTRA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

Respondents Watts and Putra acknowledge (Watts Br. in Opp. 7; Putra Br. in Opp. 7) that the courts of appeals are in conflict on the question whether a court may consider "acquitted conduct" in sentencing for the offense of conviction, but they offer three reasons why this Court should deny review of that concededly "important sentencing issue" (Putra Br. in Opp. 7). Those reasons lack merit.

1. Watts contends (Br. in Opp. 14-15) that his case is an inappropriate vehicle for resolution of the ques-

tion presented because the jury instruction given at his trial defining the meaning of "use" under 18 U.S.C. 924(c) was subsequently disapproved in *Bailey v. United States*, 116 S. Ct. 501 (1995). Watts therefore argues that resolution of this case will not guide courts in deciding whether a Section 924(c) acquittal precludes application of a sentencing enhancement under Guidelines § 2D1.1(b)(1). That argument is unsound.

The question whether a sentencing court may take into account conduct underlying an offense of which the defendant was acquitted is legal in character. As the case law demonstrates (see cases cited at Pet. 8-9 n.2; see also Putra Br. in Opp. 7), that legal issue arises in a variety of sentencing contexts, and its resolution is important to ensure uniformity in federal sentencing. Because the legal issue is squarely presented in Watts' case, it does not matter that the precise sentencing context of that case is unlikely to recur.

2. Putra argues (Putra Br. in Opp. 5-7) that the petition should be denied because her case is moot. That contention is unfounded. Although Putra has fully served the 27-month term of imprisonment originally imposed by the district court, she concedes (*id.* at 6) that, "upon remand, [she] fully intends to request" that the district court reduce her three-year term of supervised release to account for the fact that, according to the court of appeals' decision, Putra served a prison term that exceeded the upper limit of the applicable Guidelines range.

Under prevailing Ninth Circuit law, Putra appears to be eligible for a reduction in the length of her supervised release term. See *United States v. Blake*, 88 F.3d 824, 825 (1996) (holding that "when a criminal

defendant's sentence of imprisonment is reduced below the time he has already served, * * * [the] supervised release portion of the sentence begins on the date [the] [defendant's] term of imprisonment expires, whether or not he is released on that date"); see also *United States v. Smith*, 991 F.2d 1468, 1470 (9th Cir. 1993); *United States v. Montenegro-Rojo*, 908 F.2d 425, 431 n.8 (9th Cir. 1990).¹ Because supervised release is a component of Putra's sentence for her narcotics conviction (see 18 U.S.C. 3583(a)) that may still be affected by further review, the case is not moot. See *Mabry v. Johnson*, 467 U.S. 504, 507 n.3 (1984) (holding case not moot once respondent paroled, because review could affect date on which parole term would expire).

3. Both Watts and Putra contend that the conflict in this case does not warrant the Court's review because "[t]he Sentencing Commission is currently addressing the question of whether acquitted conduct may be considered 'relevant conduct' under Guideline § 1B1.3" (Watts Br. in Opp. 7; see also Putra Br. in Opp. 8).

a. The Commission has announced that one of its priorities for the 1996-1997 Guidelines amendment cycle is "developing options to limit the use of acquitted conduct at sentencing." 61 Fed. Reg. 34,465 (1996). The Commission is considering three proposals for amending the relevant conduct provision, Guidelines

¹ The United States believes that *Blake* was wrongly decided, and its suggestion for rehearing en banc is currently pending before the Ninth Circuit. Unless the government's suggestion is granted and the decision reversed, however, Putra has a plausible claim that she is entitled to a reduction in her supervised release term as a result of the time served in prison in excess of the applicable Guidelines range.

§ 1B1.3. Option 1 provides that acquitted conduct (defined as conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge) shall not be considered relevant conduct. Option 1 includes two sub-options: Option 1(A) would permit acquitted conduct to be considered in setting the guideline range if the conduct were independently established by evidence not admitted at trial; and Option 1(B) would allow acquitted conduct to be used as a basis for an upward departure. Option 2 provides that acquitted conduct could be considered relevant conduct if established by clear and convincing evidence. Option 3 provides that acquitted conduct may be considered in setting the guideline range on the same basis as other relevant conduct, but that the sentencing court may consider a downward departure if concerns of "fundamental fairness" are presented.²

b. Even if the Commission were to adopt one of the foregoing proposals, such action would not resolve the existing split of authority in the courts of appeals. That is because the Ninth Circuit—the sole court of appeals to conclude that acquitted conduct may not be relied upon at sentencing—has not rested its prohibition on an interpretation of the relevant conduct Guideline. Rather, as that court has explained, its prohibition on the use of acquitted conduct "is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." Pet. App. 24a. The Ninth Cir-

cuit's rule stems from its view that it "would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted" (*United States v. Brady*, 928 F.2d 844, 851 (1991)), and that "[t]o allow the court to increase [a defendant's] sentence based on acquitted conduct would make the jury's findings of fact pointless" (Pet. App. 25a).

Because the Ninth Circuit's rule is based on reasoning other than Guidelines interpretation, this case is not within the scope of *Braxton v. United States*, 500 U.S. 344 (1991). In *Braxton*, the Court noted that Sentencing Commission is charged with the duty "periodically [to] review and revise the Guidelines," *id.* at 348 (quoting 28 U.S.C. 994(o)), and it declined to address a question of Guidelines interpretation that had generated a circuit conflict in part "because the Commission ha[d] already undertaken a proceeding that w[ould] eliminate circuit conflict over the meaning of § 1B1.2." *Braxton*, 500 U.S. at 348-349. In this case, by contrast, the conflict does not rest on judicial disagreement over the meaning of Guidelines § 1B1.3, and Commission action (if any) cannot be expected to address the basis for the sentencing disparities created by the Ninth Circuit's sole adherence to a rule barring any consideration of acquitted conduct at sentencing.

In addition, none of the Commission's options would totally bar consideration of acquitted conduct, as the Ninth Circuit has done. It would to some extent ameliorate the circuit conflict if the Commission adopted Option 1 of the proposed amendments to Guidelines § 1B1.3. That option would amend the Guidelines in a fashion that is consistent with the Ninth Circuit's rule that acquitted conduct may not be considered in

² The Sentencing Commission has voted to publish these options in the *Federal Register* for comment. We have provided the Court and served respondents with copies of the July 18, 1996, minutes of the Sentencing Commission's meeting and the approved options.

establishing a guideline range or as a basis for departure.³ But even that course of action would not eliminate the conflict, because Option 1 still would permit a sentencing court to consider acquitted conduct in selecting a particular sentence from within the otherwise-applicable guideline range. By contrast, Ninth Circuit law would apparently prohibit even that limited consideration of acquitted conduct: the Ninth Circuit has taken the view (see Pet. App. 23a) that any reliance on acquitted conduct amounts to unfair "punishment" for a crime of which the defendant has been found not guilty.⁴

4. We note that the Ninth Circuit has recently held that one basis of its original precedent barring the consideration of acquitted conduct at sentencing has been overruled by a later decision of this Court. *United States v. Sherpa*, Nos. 95-50007 & 95-50054, 1996 WL 571175 (9th Cir. Oct. 8, 1996). The *Sherpa*

³ Enactment of Options 1(A), 1(B), and 2 would not resolve the circuit conflict because each of those alternatives runs afoul of the Ninth Circuit's bar on the use of acquitted conduct. That is, a defendant still would be "effectively punish[ed] * * * for an offense for which she has been acquitted" (Pet. App. 23a), regardless of the source of the evidence considered by the trial court (Option 1(A)); upward departures based on acquitted conduct are prohibited by *Brady* itself (Option 1(B)); and the Ninth Circuit's acquitted conduct bar "has nothing to do with the standard of proof" (*Brady*, 928 F.2d at 851 n.12) (Option 2).

⁴ In an unreported decision, a panel of the Ninth Circuit concluded that the district court's use of acquitted conduct to choose a sentence at the higher end of the applicable range was contrary to law and therefore appealable under 18 U.S.C. 3742(a). *United States v. Walsh*, 985 F.2d 577 (9th Cir. 1991) (Table). The government unsuccessfully sought en banc reconsideration of the panel's decision in *Walsh*.

decision, however, was not an acquitted-conduct case and it does not undercut the need for this Court's review of the Ninth Circuit's rule that acquitted conduct may not form the basis of an enhancement of a defendant's sentence.

In *Sherpa*, the district court departed downwards from a mandatory minimum sentence by invoking the statutory and Guidelines "safety valve" provisions. Those provisions require, *inter alia*, that the defendant has "truthfully provided to the government all information and evidence the defendant has concerning the offense * * *." 18 U.S.C. 3553(f)(5); Guidelines § 5C1.2(5). The defendant in *Sherpa* claimed that he did not know that he was carrying drugs; the jury's verdict of guilty, however, necessarily reflected a finding that the defendant did know he was carrying drugs. The panel held that a district court could find the safety valve applicable, because the court was permitted to reconsider and reject facts necessary to a jury verdict. *Sherpa*, 1996 WL 571175, at *6. In so ruling, the panel held that the conclusion in *United States v. Brady*, *supra*, that a district court may not reconsider facts necessarily rejected by a jury verdict had been overruled by *Koon v. United States*, 116 S. Ct. 2035 (1996). *Sherpa*, 1996 WL 571175, at *5. ("We now hold that the approach we took in *Brady* is overruled by the Supreme Court's decision in *Koon*.").

Sherpa does not validate the use of acquitted conduct at sentencing. That case neither involved acquitted conduct, nor addressed what the Ninth Circuit has termed the "core rationale" of *Brady*, *i.e.*, that it would "pervert our system of justice [to] allow[] a defendant to suffer punishment for a criminal charge for which he or she was acquitted."

United States v. Pinkney, 15 F.3d 825, 829 (9th Cir. 1994); see also *United States v. Duran*, 15 F.3d 131, 133 (9th Cir. 1994) (“*Brady* based its conclusion on the unfairness of punishing the defendant for an offense for which he or she had been acquitted”); Pet. App. 13a (same). If anything, *Sherpa* highlights the error in the Ninth Circuit’s acquitted conduct rule, because it leaves as the only basis for that rule the Ninth Circuit’s thesis that a defendant is “punished” for acquitted conduct when a judge considers that conduct in sentencing for another offense. That principle is squarely in conflict with this Court’s decision in *Witte v. United States*, 115 S. Ct. 2199 (1995). Pet. 15-16. Because the Ninth Circuit’s view is irreconcilable with *Witte*, and the acquitted conduct rule results in significantly different sentences in the Ninth Circuit than elsewhere, this Court’s intervention is warranted.

* * * * *

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.

FILED

SEP 30 1996

CLERK

OCTOBER TERM 1995

NO. 95-1906

UNITED STATES OF AMERICA,

PETITIONER,

vs.

VERNON WATTS,

RESPONDENT,

UNITED STATES OF AMERICA,

PETITIONER,

vs.

CHERYL PUTRA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

RICHARD T. PAFUNDI, ESQ.
367 SOUTH KING ST., #178
HONOLULU, HAWAII 96813
PHONE: 808-523-5104

ATTORNEY FOR RESPONDENT
CHERYL PUTRA

13 PM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

NO. 95-1906

UNITED STATES OF AMERICA,

PETITIONER,

vs.

VERNON WATTS,

RESPONDENT,

UNITED STATES OF AMERICA,

PETITIONER,

vs.

CHERYL PUTRA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT CHERYL PUTRA'S BRIEF IN
OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD T. PAFUNDI, ESQ.
567 SOUTH KING ST., #178
HONOLULU, HAWAII 96813
PHONE: 808-523-5104

ATTORNEY FOR RESPONDENT
CHERYL PUTRA

TABLE OF CONTENTS

Opinions below.....	1,2
Jurisdiction.....	2
Statutes and Constitutional provisions involved.....	2
Statement of the Case and Facts.....	2
Reasons for Denying the Petition.....	5
Conclusion.....	8
Appendix.....	1a

TABLE OF AUTHORITIES

Cases:

<u>Iron Arrow Honor Society vs. Heckler</u> , 464 U.S. 67, 70, 104 S.Ct. 373, 375, 78 L.Ed.2d. 58, 60 (1983).....	6
<u>Marbury vs. Madison</u> , 5 U.S. (1 Cranch) 137, 2 L.Ed. 2d 60 (1803).....	6
<u>Socialist Labor Party vs. Gilligan</u> , 406 U.S. 583, 588-589, 92 S.Ct. 1716, 1719, 32 L.Ed. 2d 317 (1972).....	7
<u>United States vs. Alder Creek Water Co.</u> , 823 F.2d. 343, 345 (9th Cir. 1987).....	6
<u>United States vs. Montenegro-Rojo</u> , 908 F.2d. 425, 431 (9th Cir. 1990).....	5
<u>United States vs. Smith</u> , 991 F.2d. 1468, 1470 (9th Cir. 1993).....	5

Statutes:

21 U.S.C. 841(a).....	3
21 U.S.C. 846.....	2
21 U.S.C. 853.....	2
28 U.S.C. 1254(1).....	2
18 U.S.C. 3231.....	3

U.S. Constitutional provisions:

Article III, Section 2.....2, 1a

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

NO. 95-1906

UNITED STATES OF AMERICA,

PETITIONER,

vs.

VERNON WATTS,

RESPONDENT,

UNITED STATES OF AMERICA,

PETITIONER,

vs.

CHERYL PUTRA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT CHERYL PUTRA'S BRIEF IN
OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Putra requests that this Court deny the
Government's Petition for a Writ of Certiorari to the United States

Court of Appeals for the Ninth Circuit. The opinion of the Court of Appeals appears at 78 F.3d. 1386, and at Appendix B to the Petition for a Writ of Certiorari.

Certiorari should be denied because there is a suggestion of mootness. The Government concedes in the Petition for a Writ of Certiorari, page 6, footnote 1, that Respondent Putra has already been released from prison, having served all of her incarceration time. The only sentencing controversy, therefore, that exists in this case is whether the sentencing court on remand will reduce her term of supervised release, in light of the Ninth's Circuit ruling herein which will reduce her guideline sentencing range from 27-33 months to 15-21 months.

JURISDICTION

The Government invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions cited by the Government, Respondent relies on Article III, Section 2 of the United States Constitution. See, Appendix, 1.

STATEMENT OF THE CASE AND FACTS

The Respondent, Cheryl Putra, on April 15, 1993, was charged in the Fifth Superseding Indictment in Count 2 with conspiring, from January 27, 1987 to May 16, 1992, to knowingly and intentionally distribute a quantity of cocaine in excess of 500 grams of cocaine, in violation of 21 U.S.C. 846 and 853. Respondent

was alleged to have committed two overt acts in furtherance of the conspiracy. Overt Act 20 alleged: "On or about May 8, 1992, defendants Vassilios Liaskos and Cheryl Putra, met with an individual in Honolulu, Hawaii and distributed approximately one ounce of cocaine." Overt Act 21 alleged: On or about May 9, 1992 defendant Vassilios Liaskos and Cheryl Putra met with an individual in Honolulu, Hawaii, and distributed approximately five ounces of cocaine."

Respondent was charged in Count 18 with aiding and abetting Vassilios Liaskos on May 8, 1992 by knowingly and intentionally possessing, with the intention to distribute, approximately one ounce of cocaine, in violation of 21 U.S.C. 841(a).

Respondent was charged in Count 19 with aiding and abetting Vassilios Liaskos on May 9, 1992 by knowingly and intentionally possessing, with the intention to distribute, approximately five ounces of cocaine, in violation of 21 U.S.C. 841(a). These counts, it should be noted, constituted the overt acts Cheryl Putra, Respondent, allegedly committed in furtherance of the alleged conspiracy. (See, Fifth Superseding Indictment at Clerk's Record "CR" 71, and Excerpt of Record "ER" at 1-20).

The United States District Court had subject matter jurisdiction pursuant to 18 U.S.C. 3231 and conducted a jury trial which resulted in a Judgment on January 6, 1994. (CR 153; ER 26-29).

REASONS FOR DENYING THE PETITION

Respondent was found not guilty of Counts 2 and 19, but was found guilty of Count 18, aiding and abetting the distribution of one ounce of cocaine.

Respondent filed her sentencing objections on Dec. 6, 1993 (CR 151). The entire Jan. 3, 1994 sentencing proceeding transcript is included in the excerpt of record as (ER 113-135).

Respondent urged the Court to refuse to take into consideration alleged conduct of Respondent for which she was acquitted. She was acquitted of Count 19, a charge alleging aiding and abetting in the distribution of 140.6 grams of cocaine. Without the Court taking into consideration this conduct, her base offense level would have been 14, so Respondent's guideline range would have been 15-21 months. Instead, because the Court took this conduct into consideration, and determined the base offense level by aggregating the cocaine allegedly involved in both the May 8 and May 9, 1992 sales, Putra's offense level went up to 18, and she fell into a 27-33 month guideline range. She was sentenced to a 27 month period of imprisonment. Since Respondent's sentence was at least 6 months in excess of what she could have been lawfully sentenced to, Respondent requested of the Ninth Circuit that the case be remanded for resentencing.

A. THERE IS A SUGGESTION OF MOOTNESS HEREIN, AS THE ONLY ISSUE UPON REMAND IS WHETHER THE DISTRICT COURT WILL SENTENCE RESPONDENT TO A REDUCED TERM OF SUPERVISED RELEASE IN LIGHT OF RESPONDENT HAVING ALREADY COMPLETED THE 27 MONTH TERM OF IMPRISONMENT ORIGINALLY IMPOSED BY THE DISTRICT COURT, THEREFORE, THERE IS NO SIGNIFICANT ACTUAL CASE OR CONTROVERSY.

Certiorari should be denied because there is a suggestion of mootness. The Government concedes in the Petition for a Writ of Certiorari, page 6, footnote 1, that Respondent Putra has already been released from prison, having served all of her incarceration time, including the upward departure sentence. The only sentencing controversy, therefore, that exists in this case is whether the sentencing court on remand will reduce her term of supervised release, in light of the Ninth's Circuit ruling herein which will reduce her guideline sentencing range from 27-33 months to 15-21 months.

The Government's Petition for a Writ of Certiorari, page 6, footnote 1, reads as follows:

"Putra was released from prison on January 12, 1996, after completing the 27 month term of imprisonment originally imposed by the district court. Putra's release does not render this case moot, because she is currently serving a three year term of supervised release, and that portion of her sentence could be affected by further review. Under the Ninth Circuit's ruling, the district on remand will be required to impose a shorter prison term than under the guidelines. In that event, respondent might under Ninth Circuit law, "be entitled to an earlier end to (her) term of supervised release." United States vs. Smith, 991 F.2d. 1468, 1470 (9th Cir. 1993); see also United States vs. Montenegro-Rojo, 908 F.2d. 425, 431 n.8 (9th Cir. 1990).

While counsel for Respondent, upon remand, fully intends to request of the District Court to reduce Respondent's term of supervised release, the question is whether this case should be heard the United States Supreme Court when this is the only issue remaining between the parties after a lengthy trial and a lengthy appellate process.

This Court, like all Federal Courts, is a court of limited jurisdiction. See, United States Constitution Article III, Section 2; See also, Appendix A. As such, its power to review the constitutionality of government acts is derived from and limited by its responsibility for resolving concrete disputes brought before it for decision. See, Marbury vs. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 2d 60 (1803).

Federal courts do not have jurisdiction to decide moot cases because they have the constitutional authority to decide only actual cases or controversies. Iron Arrow Honor Society vs. Heckler, 464 U.S. 67, 70, 104 S.Ct. 373, 375, 78 L.Ed.2d. 58, 60 (1983).

To satisfy the Article III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. A case becomes moot when interim relief or events have deprived the court of the ability to redress the party's injuries. United States vs. Alder Creek Water Co., 823 F.2d. 343, 345 (9th Cir. 1987).

The Constitutional aspect of the justiciability analysis

focuses on whether an actual case or controversy as required by Article III is presented, while the precedential part asks whether it is appropriate for this case to be litigated in a federal court by these parties at this time. Socialist Labor Party vs. Gilligan, 406 U.S. 583, 588-589, 92 S.Ct. 1716, 1719, 32 L.Ed. 2d 317 (1972).

While the ramifications of this sentencing issue are great for the Federal and State court systems of the United States, the impact upon the parties herein for the reasons previously stated, regardless of the decision herein, will be minimal.

The only issue at this point is whether the United States of America's Petition for A Writ of Certiorari should be granted. Respondent will certainly agree that there are significant consequences resulting from the split in the Federal Circuit Courts on this very important sentencing issue. The split is likely to effect the substantial majority of all multi-count criminal cases in the Federal court system, at least. Since Respondent has prevailed to date on this issue, there is no reason at this time for Respondent to cite the various constitutional provisions which would be implicated by the granting of the Petition. If, however, certiorari were to be granted, and the merits of this case required to be briefed, a host of constitutional and other corollary issues will be raised, far beyond the statutory construction issues the government has raised in its Petition for A Writ of Certiorari, including, but not limited to, those raised by Respondent Watts in

his Brief in Opposition to the Petition for A Writ of Certiorari e.g. Due Process, Double Jeopardy, collateral estoppel, and res judicata issues.

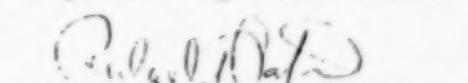
At this time, however, suffice it to argue, that the government has not cited to any provision in the Sentencing Guidelines, or application notes, that explicitly allows for the utilization of acquitted conduct as relevant conduct. It also appears that the Sentencing Guideline Commission is considering modifications to the sentencing guidelines, which would enable it to develop "options to limit the use of acquitted conduct at sentencing." 61 Federal Register 34465.

CONCLUSION

There is a suggestion of mootness in this case in that the impact of any decision herein on the parties will be restricted to whether the sentencing Court, on remand, will reduce the term of Respondent's supervised release. As such, no significant justiciable case or controversy exists which would warrant the granting of the petition for a writ of certiorari herein.

September, 1996.

Respectfully submitted,


Richard T. Pafundi, Esq.
Attorney for Respondent
CHERYL PUTRA

APPENDIX

UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

(6)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-1906. Decided January 6, 1997

PER CURIAM.

In these two cases, two panels of the Court of Appeals for the Ninth Circuit held that sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted. *United States v. Watts*, 67 F. 3d 790 (CA9 1995) ("Watts"); *United States v. Putra*, 78 F. 3d 1386 (CA9 1996) ("Putra"). Every other Court of Appeals has held that a sentencing court may do so, if the Government establishes that conduct by a preponderance of the evidence.¹ The Government filed a single petition for certiorari seeking review of both cases, pursuant to this Court's Rule 12.4, to resolve this split. Because the panels' holdings

¹*United States v. Boney*, 977 F. 2d 624, 635-636 (CA DC 1992); *United States v. Mocciole*, 891 F. 2d 13, 16-17 (CA1 1989) (criticized in dicta in *United States v. Lanoue*, 71 F. 3d 966, 984 (CA1 1995)); *United States v. Rodriguez-Gonzalez*, 899 F. 2d 177, 180-182 (CA2), cert. denied, 498 U. S. 844 (1990); *United States v. Ryan*, 866 F. 2d 604, 608-609 (CA3 1989); *United States v. Isom*, 886 F. 2d 736, 738-739 (CA4 1989); *United States v. Juarez-Ortega*, 866 F. 2d 747, 748-749 (CA5 1989) (*per curiam*); *United States v. Milton*, 27 F. 3d 203, 208-209 (CA6 1994), cert. denied, 513 U. S. ___ (1995); *United States v. Fonner*, 920 F. 2d 1330, 1332-1333 (CA7 1990); *United States v. Dawn*, 897 F. 2d 1444, 1449-1450 (CA8), cert. denied, 498 U. S. 960 (1990); *United States v. Coleman*, 947 F. 2d 1424, 1428-1429 (CA10 1991), cert. denied, 503 U. S. 972 (1992); *United States v. Averi*, 922 F. 2d 765, 765-766 (CA11 1991) (*per curiam*).

conflict with the clear implications of 18 U. S. C. §3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States*, 515 U. S. ___ (1995), we grant the petition and reverse in both cases.

In *Watts*, police discovered cocaine base in a kitchen cabinet and two loaded guns and ammunition hidden in a bedroom closet of Watts' house. A jury convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U. S. C. §841(a)(1), but acquitted him of using a firearm in relation to a drug offense, in violation of 18 U. S. C. §924(c). Despite Watts' acquittal on the firearms count, the District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. In calculating Watts' sentence, the court therefore added two points to his base offense level under United States Sentencing Commission, Guidelines Manual §2D1.1(b)(1) (Nov. 1995) (USSG). The Court of Appeals vacated the sentence, holding that "a sentencing judge may not, 'under any standard of proof,' rely on facts of which the defendant was acquitted." 67 F. 3d, at 797 (quoting *United States v. Brady*, 928 F. 2d 844, 851, and n. 12 (CA9 1991), abrogated on other grounds, *Nichols v. United States*, 511 U. S. 738 (1994)) (emphasis added in *Watts*). The Government argued that the District Court could have enhanced Watts' sentence without considering facts "necessarily rejected" by the jury's acquittal on the §924(c) charge because the sentencing enhancement did not require a connection between the firearm and the predicate offense, whereas §924(c) did. The court rejected this argument, stated that both the enhancement and §924(c) involved such a connection, and held that the District Court had impermissibly "reconsider[ed] facts that the jury necessarily rejected by its acquittal of the defendant on another count." 67 F. 3d, at 796.

In *Putra*, authorities had videotaped two transactions in which Putra and a codefendant (a major drug dealer) sold cocaine to a government informant. The indictment charged Putra with, among other things, one count of

aiding and abetting possession with intent to distribute one ounce of cocaine on May 8, 1992; and a second count of aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992, both in violation of 21 U. S. C. §841(a)(1) and 18 U. S. C. §2. The jury convicted Putra on the first count but acquitted her on the second. At sentencing, however, the District Court found by a preponderance of the evidence that Putra had indeed been involved in the May 9 transaction. The District Court explained that the second sale was relevant conduct under USSG §1B1.3, and it therefore calculated Putra's base offense level under the Guidelines by aggregating the amounts of both sales. As in *Watts*, the Court of Appeals vacated and remanded for resentencing. Reasoning that the jury's verdict of acquittal manifested an "explicit rejection" of Putra's involvement in the May 9 transaction, the Court of Appeals held that "allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted." 78 F. 3d, at 1389. The panel explained that it was imposing "a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." *Ibid.* Then-Chief Judge Wallace dissented, arguing that the panel's "sweeping language contradicts the Guidelines, our practice prior to enactment of the Guidelines, decisions of other circuits, and recent Supreme Court authority." *Id.*, at 1390.

We begin our analysis with 18 U. S. C. §3661, which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. The statute states:

"No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

We reiterated this principle in *Williams v. New York*,

337 U. S. 241 (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. We contrasted the different limitations on presentation of evidence at trial and at sentencing: "Highly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.*, at 247 (footnote omitted); see *Nichols, supra*, at 747 (noting that sentencing courts have traditionally and constitutionally "considered a defendant's past criminal behavior, even if no conviction resulted from that behavior") (citing *Williams, supra*); *BMW of North America, Inc. v. Gore*, 517 U. S. ___, ___ n. 19 (1996) (slip op., at 12, n. 19) ("A sentencing judge may even consider past criminal behavior which did not result in a conviction") (citing *Williams, supra*). Neither the broad language of §3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing. Indeed, under the pre-Guidelines sentencing regime, it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." *United States v. Donelson*, 695 F. 2d 583, 590 (CA DC 1982) (Scalia, J.).

The Guidelines did not alter this aspect of the sentencing court's discretion. "[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *Witte, supra*, at ___ (slip op., at 13) (quoting *United States v. Wright*, 873 F. 2d 437, 441 (CA 1 1989) (Breyer, J.)). Section 1B1.4 of the Guidelines reflects the policy set forth in 18 U. S. C. §3661:

"In determining the sentence to impose within the guideline range, or whether a departure from the

guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U. S. C. §3661."

Section 1B1.3, in turn, describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range. The commentary to that section states: "Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." USSG §1B1.3 comment., backg'd. With respect to certain offenses, such as Putra's drug conviction, USSG §1B1.3(a)(2) requires the sentencing court to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." Application Note 3 explains that "[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts." The Note also gives the following example:

"[W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales."

Accordingly, the Guidelines conclude that "[r]elying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses." USSG §1B1.3 comment., backg'd (emphasis added).

Although the dissent concedes that a district court may properly consider "evidence adduced in a trial that

resulted in an acquittal" when choosing a particular sentence within a guideline range, it argues that the court must close its eyes to acquitted conduct at earlier stages of the sentencing process because the "broadly inclusive language of §3661" is incorporated only into §1B1.4 of the Guidelines. This argument ignores §1B1.3 which, as we have noted, directs sentencing courts to consider all other related conduct, whether or not it resulted in a conviction. The dissent also contends that because Congress instructed the Sentencing Commission, in 28 U. S. C. §994(l), to ensure that the Guidelines provide incremental punishment for a defendant who is convicted of multiple offenses, it could not have meant for the Guidelines to increase a sentence based on offenses of which a defendant has been acquitted. *Post*, at 10. The statute is not, however, "cast in restrictive or exclusive terms." *United States v. Ebbole*, 917 F. 2d 1495, 1501 (CA7 1990). Far from limiting a sentencing court's power to consider uncharged or acquitted conduct, §994(l) simply ensures that, at a minimum, the Guidelines provide additional penalties when defendants are convicted of multiple offenses. *Ibid.* If we accepted the dissent's logic, §994(l) would prohibit a district court from considering acquitted conduct for any sentencing purposes, whether for setting the guidelines range or for choosing a sentence within that range—a novel proposition that the dissent itself does not defend. *Post*, at 4. In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted.

The Court of Appeals' position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our double jeopardy jurisprudence. The Court of Appeals asserted that, when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant "suffer[s] punishment for a criminal charge for which he or she was acquitted." *Watts*, 67 F. 3d. at 797 (quoting *Brady*, 928 F. 2d, at 851). As

we explained in *Witte*, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. 515 U. S., at ___ (slip op., at 13). In *Witte*, we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Id.*, at ___ (slip op., at 12). Rather, the defendant is "punished only for the fact that the present offense was carried out in a manner that warrants increased punishment . . ." *Id.*, at ___ (slip op., at 13); see also *Nichols*, 511 U. S., at 747.

The Court of Appeals likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury "rejects" some facts when it returns a general verdict of not guilty. *Putra*, 78 F. 3d, at 1389 (quoting *Brady*, *supra*, at 851). The Court of Appeals failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *United States v. One Assortment of 89 Firearms*, 465 U. S. 354, 361 (1984). As then-Chief Judge Wallace pointed out in his dissent in *Putra*, it is impossible to know exactly why a jury found a defendant not guilty on a certain charge.

"[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without

specific jury findings, no one can logically or realistically draw any factual finding inferences . . ." 78 F. 3d, at 1394.

Thus, contrary to the Court of Appeals' assertion in *Brady, supra*, at 851, the jury cannot be said to have "necessarily rejected" any facts when it returns a general verdict of not guilty.

For these reasons, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States*, 493 U. S. 342, 349 (1990). The Guidelines state that it is "appropriate" that facts relevant to sentencing be proved by a preponderance of the evidence, USSG §6A1.3 comment., and we have held that application of the preponderance standard at sentencing generally satisfies due process. *McMillan v. Pennsylvania*, 477 U. S. 79, 91-92 (1986); *Nichols, supra*, at 747-748. We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence.² The cases

²See *McMillan*, 477 U. S., at 88 (upholding use of preponderance standard where there was no allegation that the sentencing enhancement was "a tail which wags the dog of the substantive offense"); *Kinder v. United States*, 504 U. S. 946, 948-949 (1992) (White, J., dissenting from denial of certiorari) (acknowledging split); *United States v. Kikumura*, 918 F. 2d 1084, 1102 (CA3 1990) (holding that clear-and-convincing standard is implicit in 18 U. S. C. §3553(b), which requires a sentencing court to "find" certain facts in order to justify certain large upward departures; not reaching the due process issue); *United States v. Gigante*, 39 F. 3d 42, 48 (CA2 1994), as amended, 94 F. 3d 53, 56 (1996) (not reaching due process issue; "In our view, the preponderance standard is no more than a threshold basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. . . . Where a higher standard, appropriate to a substantially enhanced sentence range, is not met, the court should

before us today do not present such exceptional circumstances, and we therefore do not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

Accordingly, the Court of Appeals erred in both cases before us today. In *Putra*, the jury simply found that the prosecution had not proved the defendant's complicity in the May 9 sale beyond a reasonable doubt. The acquittal sheds no light on whether a preponderance of the evidence established Putra's participation in that transaction. Likewise, in *Watts*, the jury acquitted the defendant of using or carrying a firearm during or in relation to the drug offense. That verdict does not preclude a finding by a preponderance of the evidence

depart downwardly"); *United States v. Lombard*, 72 F. 3d 170, 186-187 (CA1 1995) (authorizing downward departure in "an unusual and perhaps a singular case" that may have "exceeded" constitutional limits, where acquitted conduct calling for a "enormous" sentence enhancement "is itself very serious conduct," "where the ultimate sentence is itself enormous, and where the judge is seemingly mandated to impose that sentence"); see also *United States v. Townley*, 929 F. 2d 365, 369 (CA8 1991) ("At the very least, *McMillan* allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentencing enhancement factor becomes 'a tail which wags the dog of the substantive offense'" (quoting *McMillan, supra*, at 88); *United States v. Restrepo*, 946 F. 2d 654, 656, n. 1 (CA9 1991) (en banc) (suggesting that clear and convincing evidence might be required for extraordinary upward adjustments or departures), cert. denied, 503 U. S. 961 (1992); *United States v. Lam Kwong-Wah*, 966 F. 2d 682, 688 (CADC) (same), cert. denied, 506 U. S. 901 (1992); *United States v. Trujillo*, 959 F. 2d 1377, 1382 (CA7) (same), cert. denied, 506 U. S. 897 (1992). But see *United States v. Washington*, 11 F. 3d 1510, 1516 (CA10 1993) ("At least as concerns making guideline calculations the issue of a higher than a preponderance standard is foreclosed in this circuit"), cert. denied, 511 U. S. 1020 (1994).

that the defendant did, in fact, use or carry such a weapon, much less that he simply possessed the weapon in connection with a drug offense.

The petition for certiorari is granted, the judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion. Respondent Putra's motion to proceed *in forma pauperis* is granted. The motion of Morris L. Whitman for leave to file a brief as *amicus curiae* is granted.

It is so ordered.

(1)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-1906. Decided January 6, 1997

JUSTICE SCALIA, concurring.

I do not agree with the assertion in JUSTICE BREYER's concurrence that there is no obstacle to the Commission's reversing today's outcome by mandating disregard of the information we today hold it proper to consider. Title 28 U. S. C. §994(b)(1) requires the Guidelines to be "consistent with all pertinent provisions of title 18, United States Code." In turn, 18 U. S. C. §3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." In my view, neither the Commission nor the courts have authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines, may not be considered for that purpose (or may be considered only after passing some higher standard of probative worth than the Constitution and laws require) if it pertains to acquitted conduct. If the Commission believes that the rules of evidence and proof established by the Constitution and laws are inadequate, it may of course recommend changes to the Congress, cf. 28 U. S. C. §994(w).

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-1906. Decided January 6, 1997

JUSTICE BREYER, concurring.

I join the Court's *per curiam* opinion while noting that it poses no obstacle to the Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant.

In telling judges in ordinary cases to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," United States Sentencing Commission, Guidelines Manual §1B1.3(a)(2)(Nov. 1995)(USSG), the Guidelines recognize the fact that before their creation sentencing judges often took account, not only of the precise conduct that made up the offense of conviction, but of certain related conduct as well. And I agree with the Court that the Guidelines, as presently written, do not make an exception for related conduct that was the basis for a different charge of which a jury acquitted that defendant. To that extent, the Guidelines' policy rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions.

This truth of logic, however, is not the only pertinent policy consideration. The Commission in the past has considered whether the Guidelines should contain a

278

specific exception to their ordinary "relevant conduct" rules that would instruct the sentencing judge not to base a sentence enhancement upon acquitted conduct. United States Sentencing Commission, Sentencing Guidelines for United States Courts, 57 Fed. Reg. 62832 (1992) (proposed USSG §1B1.3(c)). Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. For this reason, I think it important to specify that, as far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands.

(9)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-1906. Decided January 6, 1997

JUSTICE STEVENS, dissenting.

"The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes." *Burns v. United States*, 501 U. S. 129, 132 (1991). The goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution.¹ Strict mandatory rules have dramatically confined the exercise of judgment based on a totality of the circumstances. "While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed." *Mistretta v. United States*, 488 U. S. 361, 413 (1989) (SCALIA, J., dissenting).

¹Compare *Williams v. New York*, 337 U. S. 241, 247-248 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence"), with 28 U. S. C. §994(k) (rejecting rehabilitation as a goal of imprisonment) and 18 U. S. C. §3553(a)(2) (stating that punishment should serve retributive, deterrent, educational and incapacitative goals).

I

In 1970, during the era of individualized sentencing, Congress enacted the statute now codified as 18 U. S. C. §3661 to make it clear that otherwise inadmissible evidence could be considered by judges in the exercise of their sentencing discretion. The statute, however, did not tell the judge how to weigh the significance of any of that evidence. The judge was free to rely on any information that might shed light on a decision to grant probation, to impose the statutory maximum, or to determine the precise sentence within those extremes. Wisdom and experience enabled the judge to give appropriate weight to uncorroborated hearsay or to evidence of criminal conduct that had not resulted in a conviction. Even if convinced that a jury had erroneously acquitted a defendant, the judge was not required to ignore the evidence of guilt. At the same time, however, he or she was free to discount the significance of that evidence if mitigating circumstances—perhaps the same facts that persuaded the jury that an acquittal was appropriate—were present. Like a jury in a capital case, the judge could exercise discretion “to dispense mercy on the basis of factors too intangible to write into a statute,” *Gregg v. Georgia*, 428 U. S. 153, 222 (1976) (White, J., concurring in judgment).

Although the Sentencing Reform Act of 1984 has cabined the discretion of sentencing judges, the 1970 statute remains on the books. As was true when it was enacted, §3661 does not speak to questions concerning the relevance or the weight of any item of evidence. That statute is not offended by provisions in the Guidelines that proscribe reliance on evidence of economic hardship, drug or alcohol dependence, or lack of guidance as a youth, in making certain sentencing decisions. See *Koon v. United States*, 518 U.S. —, — (1996) (slip op., at 9–10). Conversely, that statute does not command that any particular weight—or indeed that any weight at all—be given to evidence that a defendant

may have committed an offense that the prosecutor failed to prove beyond a reasonable doubt. In short, while the statute that introduces the Court's analysis of these cases, *ante*, at 3, does support its narrow holding that sentencing courts may sometimes "consider conduct of the defendants underlying other charges of which they had been acquitted," *ante*, at 1, it sheds no light on whether the district judges' application of the Guidelines in the manner presented in these cases was authorized by Congress, or is allowed by the Constitution.

A closer examination of the interaction among §3661, the other provisions of the Sentencing Reform Act, and the Guidelines demonstrates that the role played by §3661 is of a narrower scope than the Court's opinion suggests. The Sentencing Reform Act was enacted primarily to address Congress' concern that similar offenders convicted of similar offenses were receiving "an unjustifiably wide range of sentences." S. Rep. No. 98-225, p. 38 (1983). It therefore created the Sentencing Commission (or Commission) and directed it to draft Guidelines that would cabin the discretion of all judges—those who were too harsh as well as those who were too lenient. See 28 U. S. C. §991(b)(1)(B). While the abolition of parole indicates that the new rules were generally intended to increase the minimum levels of punishment, see 18 U. S. C. §§3624(a) and (b), they also confined the judges' authority to impose the maximum sentences authorized by statute. The central mechanism that Congress promulgated to avoid disparate sentencing in typical cases is a requirement that for any sentence of imprisonment in the Guidelines, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months," 28 U. S. C. §994(b)(2). The determination of which of these narrow ranges a particular sentence should fall into is made by operation of mandatory rules, but within the particular range, the judge retains broad discretion to set a particular sentence.

By their own terms, the Guidelines incorporate the broadly inclusive language of §3661 only into those portions of the sentencing decision in which the judge retains discretion.

United States Sentencing Commission, Guidelines Manual §1B1.4 (Nov. 1995) provides:

"In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U. S. C. §3661."

Thus, as in the pre-Guidelines sentencing regime, it is in the area in which the judge exercises discretion that §3661 authorizes unlimited access to information concerning the background, character, and conduct of the defendant. When the judge is exercising such discretion, I agree that he may consider otherwise inadmissible evidence, including evidence adduced in a trial that resulted in an acquittal. But that practice, enshrined in §3661 and USSG §1B1.4, sheds little, if any, light on the appropriateness of the District Courts' application of USSG §1B1.3, which defines relevant conduct for the purposes of determining the Guidelines range within which a sentence can be imposed.

II

The issue of law raised by the sentencing of Cheryl Putra involved the identification of the offense level that determined the range within which the judge could exercise discretion. Because she was a first offender with no criminal history, that range was based entirely on the offense or offenses for which she was to be punished. She was found guilty of aiding and abetting the intended distribution of one ounce of cocaine on May 8, 1992, but not guilty of participating in a similar

transaction involving five ounces of cocaine on May 9, 1992. *United States v. Putra*, 78 F. 3d 1386, 1387 (CA9 1996). If the guilty verdict provided the only basis for imposing punishment on Ms. Putra, the Guidelines would have required the judge to impose a sentence of no less than 15 months in prison and would have prohibited him from imposing a sentence longer than 21 months.

If Putra had been found guilty of also participating in the 5 ounce transaction on May 9, 1992, the Guidelines would have required that both the minimum and the maximum sentences be increased; the range would have been between 27 and 33 months. As the District Court applied the Guidelines, precisely the same range resulted from the acquittal as would have been dictated by a conviction. Notwithstanding the absence of sufficient evidence to prove guilt beyond a reasonable doubt, the alleged offense on May 9 led to the imposition of a sentence six months longer than the maximum permitted for the only crime that provided any basis for punishment.²

In my judgment neither our prior cases nor the text

²The circumstances surrounding Vernon Watts' sentencing were somewhat different from those involved in Putra's sentencing. Watts was acquitted of the crime of using a firearm in relation to a drug offense, in violation of 18 U. S. C. §924(c), but was found guilty of certain drug crimes. *United States v. Watts*, 67 F. 3d 790, 793 (CA9 1995). The sentencing judge enhanced Watts' base offense level by two points, pursuant to USSG §2D1.1(b)(1), after concluding that the defendant's "possession" of the firearm in connection with the crime had been proved by a preponderance of the evidence. 67 F. 3d, at 797-798. Because the "use" of a firearm and its "possession" are not identical, the judge may not have relied on facts necessarily rejected by the jury in concluding that the sentencing enhancement was appropriate. I nevertheless believe that the enhancement was inappropriate because it was based on conduct that the judge found only by a preponderance of the evidence. Since Watts' base offense level was increased by this evidence, I believe it should have been proved beyond a reasonable doubt.

of the statute warrants this perverse result. And the vigor of the debate among judges in the courts of appeals on this basic issue belies the ease with which the Court addresses it, without hearing oral argument or allowing the parties to fully brief the issues.³

III

The Court relies principally on three cases—*Williams v. New York*, 337 U. S. 241 (1949); *McMillan v. Pennsylvania*, 477 U. S. 79 (1986); and *Witte v. United States*,

³Although the Court's decision suggests that the approach taken by the Ninth Circuit in these cases breaks from settled law in every other Circuit, the opinion ignores the fact that respected jurists all over the country have been critical of the interaction between the Sentencing Guidelines' mechanical approach and the application of a preponderance of the evidence standard to so-called relevant conduct. See, e.g., *United States v. Silverman*, 976 F. 2d 1502, 1519, 1527 (CA6 1992) (Merritt, C. J., dissenting); *Id.*, at 1533 (Martin, J., dissenting); *United States v. Concepcion*, 983 F. 2d 369, 389, 396 (CA2 1992) (Newman, C. J., concurring) ("A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal"); *United States v. Galloway*, 976 F. 2d 414, 436 (CA8 1992) (Bright, J. dissenting, joined by Arnold, C. J., Lay, J., and McMillian, J.); *United States v. Restrepo*, 946 F. 2d 654, 663 (CA9 1991) (Pregerson, J., dissenting, joined by Hug, J.); *Id.*, at 664 (Norris, J., dissenting, joined by Hug, J., Pregerson, J., and D. W. Nelson, J.). Cf. *United States v. Lanoue*, 71 F. 3d 966, 984 (CA1 1995) ("Although it makes no difference in this case, we believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him"). See also Martin, The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process, 3 Const. L. J. 25, 34–36 (1993); Beale, Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence," 35 Wm. & Mary L. Rev. 147, 157–158 (1993); Herman, The Tail that Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process, 66 S. Cal. L. Rev. 289 (1992); Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 Am. Crim. L. Rev. 161, 208–220 (1991).

515 U.S. (1995)—to justify its outcome. In each instance, the reliance is misplaced.

For three reasons, *Williams* cannot support the result in these cases. First, it dealt with the exercise of the sentencing judge's discretion within the range authorized by law, rather than with rules defining the range within which discretion may be exercised. Second, “[t]he accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise.” *Williams*, 337 U. S., at 244. The precise question here—the burden of proof applicable to sentencing facts—was thus not before the Court in that case. Third, its rationale depended largely on agreement with an individualized sentencing regime that is significantly different from the Guidelines system. “*Williams* was decided in the context of a sentencing ‘system that focus[e]d on subjective assessments of rehabilitative potential. . . .’ Saltzburg, [Sentencing Procedures: Where Does Responsibility Lie?, 4 Fed. Sent. Rep. 248, 250 (1992)].” *United States v. Wise*, 976 F. 2d 393, 409 (CA 1992) (Arnold, C. J., concurring in part and dissenting in part). As this Court has acknowledged, see *Burns*, 501 U. S., at 132, the Guidelines wrought a dramatic change in sentencing processes, replacing the very system that justified *Williams* with a rigid system in which “[f]or most defendants in the federal courts, sentencing is what the case is really about.” *Wise*, 976 F. 2d, at 409.

Even more than *Williams*, this Court, like all of the Circuits that have adopted the same approach as the District Courts in these cases, relies primarily on the misguided five-to-four decision in *McMillan v. Pennsylvania*, 477 U. S. 79 (1986). For the reasons stated in my dissent in that case, *id.*, at 95–104, I continue to believe that it was incorrectly decided and that its holding should be reconsidered. Even accepting its holding that the Constitution does not require proof beyond a reason-

able doubt to establish a sentencing factor that increases the minimum sentence without altering the maximum, however, there are at least two reasons why *McMillan* does not dictate the outcome of these cases.

In *McMillan*, as in these cases, the defendant's minimum sentence was enhanced on the basis of a fact proved by a preponderance of the evidence. But in *McMillan*, the maximum was unchanged; the sentence actually imposed was within the range that would have been available to the judge even if the enhancing factor had not been proved. In these cases, however, the sentences actually imposed were higher than the Guidelines would have allowed without evidence of the additional offenses. The *McMillan* opinion pointedly noted that the Pennsylvania statute had not altered "the maximum penalty for the crime committed" and operated "solely to limit the sentencing courts' discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.*, at 87-88. Given the Court's acknowledged "inability to lay down any 'bright line' test" that would define the limits of its holding, *id.*, at 91, and its apparent assumption that a sentencing factor should not be allowed to serve as a "tail which wags the dog of the substantive offense," *id.*, at 88, see also *ante*, at 7, n. 2, the holding should not be extended to allow a fact proved by only a preponderance to increase the entire range of penalties within which the sentencing judge may lawfully exercise discretion.⁴

Moreover, *McMillan* addressed only the constitutionality of a statute the meaning of which was perfectly clear. Nothing in the text of the Sentencing Reform Act of 1984 even arguably mandates the result that the District Courts reached in these cases. Indeed, as

⁴I recognize that the shift from one Guideline range to a higher range does not produce a sentence beyond the statutory maximum. It does, however, mandate a sentence that is above the maximum that the judge would have had the legal authority to impose absent consideration of the "relevant conduct."

JUSTICE BREYER points out in his separate concurrence, *ante*, at 2, the Sentencing Commission unquestionably has the authority to disallow the consideration of acquitted conduct. Similarly, the Commission could have chosen to set the burden of proof for sentencing proceedings at beyond a reasonable doubt without running afoul of the enabling legislation. Given the lack of a contrary command in the statute itself, as well as the complete absence of any pre-1984 precedent for establishing the range of a permissible sentence on the basis of a fact proved only by a preponderance of the evidence, the *McMillan* opinion which was announced in 1986 can shed no light on the meaning of the 1984 Act.

Nor does the Court's decision in *Witte v. United States*, 515 U.S. — (1995), dictate the answer to the question presented by these cases. I continue to disagree with the conclusion reached by the Court in *Witte*, that the Double Jeopardy Clause does not prohibit convicting and sentencing an individual for conduct that has been decisive in determining the individual's offense level for a previous conviction. But that is a different issue from the one here. The opinion in *Witte*, carefully and repeatedly, confined the Court's holding to the double jeopardy context. *Id.*, at (slip op., at 8) (defendant in this case "is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted"); *id.*, at (slip op., at 9) (disputed practice is not "punishment for that conduct within the meaning of the Double Jeopardy Clause"); *id.*, at (slip op., at 14) (practice "constitutes punishment only for the offense of conviction for purposes of the double jeopardy inquiry"). What is at issue in these cases is not whether a defendant is being twice punished or prosecuted for the same conduct, but whether her initial punishment has been imposed pursuant to rules that are authorized by the statute and consistent with the Constitution.

IV

Putra's case involves "multiple offenses." She was charged with several offenses and received a sentence

that was based on the judge's conclusion that she was guilty of each of these multiple offenses even though she had in fact been found guilty of only one offense. It is therefore appropriate to consider what the Sentencing Reform Act has to say about "multiple offenses."

In 28 U. S. C. §994(l) Congress specifically directed the Commission to ensure that the Guidelines included incremental sentences for multiple offenses. That subsection provides:

"The Commission shall insure that the Guidelines promulgated . . . reflect—

"(1) the appropriateness of imposing an incremental penalty for each offense in a case *in which a defendant is convicted of*—

"(A) *multiple offenses* committed in the same course of conduct . . . ; and

"(B) *multiple offenses* committed at different times. . ." (Emphasis added.)

It is difficult to square this explicit statutory command to impose incremental punishment for each of the "multiple offenses" of which a defendant "is convicted" with the conclusion that Congress intended incremental punishment for each offense of which the defendant has been acquitted.⁵ The Court, however, appears willing to

⁵Courts upholding the Guidelines' relevant conduct provisions and their application in cases such as these have tended to focus their attention exclusively on those provisions in the statute that direct courts and the Commission to consider the "nature and circumstances of the offense" in determining an appropriate sentence. 18 U. S. C. §3553(a)(1); see also 28 U. S. C. §994(d). In §994(d), Congress granted the Sentencing Commission the authority to "consider whether [certain enumerated factors], among others, have any relevance," in establishing Guidelines for offenses. Some courts have concluded that the inclusion of the qualifier "among others" in this provision indicated that Congress intended the Commission to include anything it felt was relevant to the sentencing decision. See, e.g., *United States v. Galloway*, 976 F. 2d at 420-421; *United*

read the statute's treatment of multiple offenses as though it authorized an incremental penalty for each offense for which the defendant was indicted if she is convicted of at least one such offense. The fact that the text of the statute expressly authorizes such incremental punishment "for each offense" only when a "defendant is convicted of . . . multiple offenses" conveys a far different message to thoughtful judges.⁶

In my opinion the statute should be construed in the light of the traditional requirement that criminal charges must be sustained by proof beyond a reasonable doubt. That requirement has always applied to charges involving multiple offenses as well as a single offense. Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.

I respectfully dissent.

States v. Thomas, 932 F. 2d 1085, 1089 (CA5 1991), cert. denied *sub nom. Pullock v. United States*, 502 U.S. 895, and *Samuels v. United States*, 502 U.S. 962 (1992).

But this provision cannot be read separately from the rest of the statute. The clear congressional directive concerning sentencing for "multiple offenses" must be read as an important limit on the "other[r]" factors that can be considered relevant to determination of an offense level.

⁶Some judges have concluded, in large part because of this provision, that the Guidelines' relevant conduct rules are outside the scope of the authority Congress granted to the Commission. See *Galloway*, 976 F. 2d, at 430-431 (Beam, J., dissenting); *United States v. Davern*, 970 F. 2d 1490, 1507 (CA6 1992) (Merritt, C. J. dissenting).

(10)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-1906. Decided January 6, 1997

JUSTICE KENNEDY, dissenting.

A case can be made for summary reversal here, based on such factors as the conflict between the rationale of the Court of Appeals for the Ninth Circuit and the rationale of this Court in *Williams v. New York*, 337 U.S. 241 (1949), and, to a lesser extent, in *Witte v. United States*, 115 S. Ct. 2199 (1995); the conflict the Ninth Circuit created, without considering *en banc* its departure from the rule followed in all other circuits; and the lack of any clear authority to constrain the sentencing judge as the Court of Appeals seeks to do.

On the other hand, it must be noted the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system. We have not decided a case on this precise issue, for it involves not just prior criminal history but conduct underlying a charge for which the defendant was acquitted. At several points the per curiam opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off.

At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal, concerns noted by Justice Stevens and the other federal judges to whom he

refers in his dissent. If there is no clear answer but to acknowledge a theoretical contradiction from which we cannot escape because of overriding practical considerations, at least we ought to say so. Finally, as Justice Stevens further points out, the effect of the Sentencing Reform Act of 1984 on this question deserves careful exploration. This is illustrated by the fact that Justices Scalia and Breyer each find it necessary to issue separate opinions setting forth differing views on the role of the Sentencing Commission.

For these reasons the case should have been set for full briefing and consideration on the oral argument calendar. From the Court's failure to do so, I dissent.